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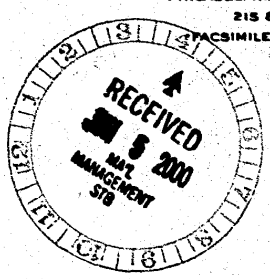

June 5, 2000

Mr. Vernon A. Williams, Secretary
Surface Transportation Board
Office of the Secretary
Case Control Unit
Attn: STB Ex Parte No. 582 (Sub-No.1)
1925 K Street, N.W.
Washington, DC 20423-0001

Re: Major Rail Consolidation Procedures (STB Ex Parte No. 582 (Sub-No. 1))

Dear Mr. Williams:

Enclosed for filing in the above-referenced proceeding are an original and 25 copies of the Reply Comments of Canadian National Railway Company. In accordance with the Board's notice served March 31, 2000, in this proceeding, all pages of this filing, including this cover letter, are paginated consecutively.

Also enclosed is a diskette containing the text of this filing in WordPerfect 6/7/8/9 format.

Very truly yours,

Paul A. Cunningham

Enclosures

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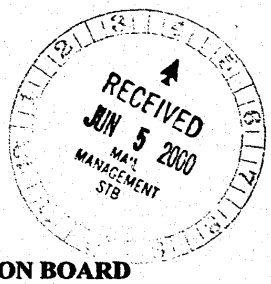

BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES -
ADVANCE NOTICE OF PROPOSED RULEMAKING

REPLY COMMENTS OF CANADIAN NATIONAL RAILWAY COMPANY

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June 5, 2000

TABLE OF CONTENTS

GLOSSARY OF ABBREVIATIONS

AAM	The Alliance of Automobile Manufacturers
AAPA	American Association of Port Authorities
AAR	Association of American Railroads
AFBF	American Farm Bureau Federation
AFBA	American Forest and Paper Association
Ameren	Ameren Services Company
ANPR	Major Rail Consolidation Procedures, STB Ex Parte No. 582 (Sub-No. 1) (STB served Mar. 31, 2000)
APA	Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706
APC	American Plastics Council
App.	Appendix
APTA	American Public Transportation Association
ARC	Alliance for Rail Competition
ASLRRA	American Short Line and Regional Railroad Association
BASF	BASF Corporation
BN/SF	Burlington N. Inc. – Control – Santa Fe Pac. Corp., ICC Finance Docket No. 32549
BNSF	Burlington Northern Santa Fe Corporation and The Burlington Northern and Santa Fe Railway Company
BNSF/CN	Burlington Northern Santa Fe Corporation and The Burlington Northern and Santa Fe Railway Company and The Canadian National Railway Company and subsidiaries
Board	Surface Transportation Board

Bottleneck	Central Power & Light Co. v. Southern Pac. Transp. Co., 1996 STB LEXIS 358, Finance Docket No. 41242 (STB served Dec. 31, 1996) (Bottleneck I) Central Power & Light Co. v. Southern Pac. Transp. Co., 1997 STB LEXIS 91, Finance Docket No. 41242 (STB served Apr. 30, 1997) (Bottleneck II)
BPM	Bentonite Performance Minerals
CEO	Chief Executive Officer
CFI	Council of Forest Industries
CMA	Chemical Manufacturers Association
CN	Canadian National Railway Company and subsidiaries
CN/IC	Canadian National Railway Company and subsidiaries and The Illinois Central Corporation
CNW	Chicago and North Western Transportation Company (formerly Chicago and North Western Holdings, Inc.) and Chicago and North Western Railway Company (formerly Chicago and North Western Transportation Company)
Conrail	Conrail, Inc.
CP	Canadian Pacific Railway Company
CPPA	Canadian Pulp and Paper Association
CPUC	California Public Utilities Commission
CRI	Crossroad Intermediaries
CSX	CSX Corporation and CSX Transportation, Inc.
CSX/NS	CSX Corp. – Control – Conrail Inc., STB Finance Docket No. 33388
CURE	Consumers United for Rail Equity
Decision	Public Views on Major Rail Consolidations, STB Ex Parte No. 582 (STB served March 16, 2000)

DM&E	Dakota Minnesota and Eastern Railroad Corporation
DOD	Department of Defense
DOJ	Department of Justice
DOT	Department of Transportation
DT & I	Detroit, T. & I. R. Co. Control, 275 I.C.C. 455 (1950)
ECTA	Eastern Coal Transportation Association
EEI	Edison Electric Institute
EMEC	Edison Mission Energy Company and Midwest Generation LLC
Du Pont	E.I. Du Pont de Nemours & Co.
EWLC	Empire Wholesale Lumber Co.
FCC	Federal Communications Commission
FGLK	Finger Lakes Railway Corporation
FRA	Federal Railroad Administration
FTC	Federal Trade Commision
GAO	U.S General Accounting Office
GM	General Motors Corporation
GPTC	Glass Producers Transportation Council
ICC	Interstate Commerce Commission
ICCTA	ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803
IMC	IMC Global Inc.
IMPACT	Committee to Improve American Coal Transportation
KCS	Kansas City Southern Railway Company

Metra	The Commuter Rail Division of the Regional Transportation Authority of Northeast Illinois
Midtec	Midtec Paper Corp. v. United States, 857 F.2d 1487 (D.C. Cir. 1988)
MKT	Missouri-Kansas-Texas Railroad Company
MP	Minnesota Power Inc.
MTMC	Military Traffic Management Command
MWBC	Montana Wheat & Barley Commission
NAFTA	North American Free Trade Agreement
NDGDA	North Dakota Grain Dealers Association
NEPA	National Environmental Policy Act
NGFA	National Grain and Feed Association
NITL	National Industrial Transportation League
NJ Transit	New Jersey Transit Corporation
NMA	National Mining Association
NS	Norfolk Southern Corporation and Norfolk Southern Railway Company
NWFA	Northwest Forestry Association
NY	State of New York
OG&E	Oklahoma Gas & Electric Company
ORDC	Ohio Rail Development Commission
OxyChem	Oxychem and Oxyvinyls, LP
PANY/NJ	Port Authorities of New York and New Jersey
POSTE	Port of Seattle, Port of Tacoma and the Port of Everett

PPG	PPG Industries, Inc.
PP&L	PPL Electric and Utilities Corporation
RLD	Rail Labor Division, Transportation Trades Department, AFL-CIO
RSPO	Rail Services Planning Office
RTP	Rail Transportation Policy
SEC	Security Exchange Commission
SSC	Seneca Sawmill Company
SF/SP	Santa Fe S. Pac. Corp. - Control - Southern Pac. Transp. Co.
Shell	Shell Oil Company
SIP	Safety Integration Plan
SP	Southern Pacific Rail Corporation, Southern Pacific Transportation Company, The Denver and Rio Grande Western Railroad Company, St. Louis Southwestern Railway Company, and SPCSL Corp.
SPI	Society of the Plastic Industry, Inc.
Staggers Act	Staggers Rail Act of 1980, Pub. L. No. 95-473, 92 Stat. 1295
STB	Surface Transportation Board
TCU	Transportation Communications International Union
Tex-Mex	Texas Mexican Railway Company
TFI	The Fertilizier Institute
TIA	Transportation Intermediaries Association
Toyota	Toyota Logistics Services, Inc
UP	Union Pacific Railroad Company

UP/CNW	Union Pac. Corp. – Control – Chicago & N.W. Holdings, Inc., ICC Finance Docket No. 33221
UP/MP	Union Pac. Corp - Control & Merger - Missouri Pac. Corp.
UP/SP	Union Pac. Corp. – Control & Merger – Southern Pac. Rail Corp., ICC Finance Docket No. 32760
UTU	United Transportation Union
WC	Wisconsin Central Transportation Corporation, holding company of Wisconsin Central Ltd., Fox Valley & Western Ltd., WCL Railcars, Inc., Sault Ste. Marie Bridge Company, WC Canada Holdings, Inc., and Algoma Central Railway Inc.
WCS	Wisconsin Central System
WCSA	Western Canadian Shippers Association
WCTA	Western Coal Transportation Association
WCTL	Western Coal Transportation League
WE	Williams Energy Services
WP	Wisconsin Power and Light Company
WTO	World Trade Organization
WyCo.	Weyerhaeuser Company

BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES –
ADVANCE NOTICE OF PROPOSED RULEMAKING

REPLY COMMENTS OF CANADIAN NATIONAL RAILWAY COMPANY

INTRODUCTION

Canadian National Railway Company, Grand Trunk Western Railroad Incorporated, and Illinois Central Railroad Company (collectively, "CN") hereby file reply comments in response to the Board's Advance Notice of Proposed Rulemaking, Major Rail Consolidation Procedures, served March 31, 2000 ("ANPR").[1]

The comments confirm CN's view that very little in the ANPR relates to matters of merger policy. Rather, most of these issues are matters of general industry policy, and should be pursued, if the Board considers them to be regulatory and not legislative issues, as generic issues in separate proceedings. The comments also confirm that there are no new issues relating directly to mergers. The few issues that do relate to mergers are ones that have long been addressed by the Board in individual merger proceedings. They can and should largely be left to

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[1]As in its opening comments, CN will use the term "merger" to refer to any transaction requiring approval under 49 U.S.C. § 11323 involving one or more Class I railroads. Acronyms and other abbreviated designations that appear in the text are defined in the attached glossary.

case-by-case examination in individual merger proceedings; to attempt to capture in a rule all of the relevant considerations would be unduly prescriptive and, in any event, impossible. CN Thus continues to question the need for further rulemaking. In any event, there is nothing to prevent the Board from addressing these particular issues far more expeditiously than the 15-month schedule the Board has proposed.

For all of these reasons, a prompt determination of policy direction to be applied on a case-by-case basis still appears to be the most appropriate course. However, if the Board is determined to propose rules, it could reasonably propose amendments to its rules with respect to certain matters relating to safeguarding rail service; a change relating to petitions for waiver of the one-case-at-a time rule that would allow the Board to craft a principled exception through the issuance of discrete transaction-specific orders; and a rule to preserve for shippers the contract exception provided by the Board's Bottleneck decision.

CN's opening comments supported the Board's initiatives to develop means to better assure that merger implementation does not entail major service disruptions. CN suggested an approach which bears many similarities to the approach suggested by DOT and a number of other commenters. The stated goals of most of those who commented on the subject of safeguarding rail service would be taken into account and well-served by the approach suggested by CN. That approach would enable the Board effectively to assess the public interest, without imposing unnecessary cost and delay, and would retain appropriate flexibility and adaptability for those running the railroads. With respect to service guarantees, CN outlines the general elements that the Board might expect or require applicants to address, while recognizing that the particulars,

including shipper-oriented measurements of performance, should be left to discussion and negotiation between the merging railroads and their customers.

With respect to downstream transactions, CN reiterates its suggestion that the Board amend its rule to allow any party to petition for waiver of the one-case-at-a time rule. In that way, the Board will be able to assess the plausibility and seriousness of the asserted concerns in the context of a specific transaction, and craft an appropriate order that allows for the consideration of a downstream transaction for which a definitive merger agreement has been filed with the SEC and that is explicitly and unambiguously contingent on consummation of the pending transaction. As CN points out, and as any fair reading of the comments confirms, the consideration of downstream transactions is too fraught with uncertainty and anticompetitive potential, too likely to impose regulatory costs that outweigh any regulatory benefits, and too little understood, for the Board to crystallize a more lenient policy into a rule. A rulemaking proceeding will not overcome these inherent difficulties. The expansion of regulation urged by proponents runs counter to the most fundamental tenets of modern regulatory policy, as reflected in congressional and executive mandates to streamline, simplify, and eliminate intrusive, ill-justified regulatory regimes. The Board should preserve its ability to deal with these issues on a case-by-case basis.

The issue of downstream transactions has emerged as one that particularly threatens competition and innovation in the rail industry, and the Board's role and obligation to approve mergers that are consistent with the public interest. Comments on downstream transactions reveal that the Class I railroads that are opposed to the merger of CN and BNSF are using the

ANPR to press a protectionist agenda through proposals that would uniquely burden the first post-rule transaction in contrast to later transactions, without advancing the public interest.

UP and CSX urge the Board to require applicants to divine hypothetical transactions or address hypothetical industry structures, with the net effect of imposing a central planning regime in which nothing can happen until everything is decided. These proposals are inherently biased against the first post-rule transaction, not only by imposing vastly increased complexity, delay, and uncertainty in the proceeding itself, but by imposing on the first transaction all conditions that may appear to respond to the combined effects or interaction of the first and some later transaction(s). None of these proposals can withstand the first test for expanded regulation: whether the costs will outweigh the benefits.

These railroads urge approaches that (a) would be beyond the Board's authority, (b) would enmesh the Board in intractable evidentiary and analytic problems, and (c) at the same time would require the Board to attempt to make reasoned findings about transactions that may never occur, about which important particulars cannot possibly be known, with respect to questions whose answers -- whether yes, no, or maybe-- could not be expected to provide a lawful, logical basis for the Board to deny approval of a pending transaction that it otherwise would have approved, or to condition its approval with conditions that it would not otherwise have imposed, or to approve a transaction that it otherwise would have denied. These proposals should be recognized for the protectionist maneuvers that they are and dismissed.

CN reiterates the suggestion in its opening comments that, if the Board believes that it needs to become better informed in advance about the ramifications of a two-railroad North American structure, it should initiate an expedited informational proceeding for the purpose of

"hearing views and enriching the understanding of the duopoly question by the Board and all railroads and their constituencies." CN at 20. The purpose of such a proceeding would not be to write rules or guidelines. Instead, the proceeding "would draw into one forum the best information and analyses that are available in advance of a proposal for a particular East-West transaction." Id. On the basis of the informational record, "potential applicants for an East-West transcontinental transaction would evaluate their options and frame any transaction accordingly. If such an application were presented, the Board would evaluate the merits in light of the knowledge gained (which might include the knowledge that the Board's longstanding approach to individual mergers remains the proper approach in the transcontinental context)." Id.

I. SAFEGUARDING RAIL SERVICE

CN's initial comments (at 12-16) proposed that the Board advise potential applicants for approval of a consolidation transaction that they should address the subject of safeguarding service during the implementation of the transaction.

CN added that the Board could supplement the general request – born of the experience of the service disruptions following the UP/SP merger and the complex and extraordinary division of Conrail by CSX and NS – with more particular requirements on a case-by-case basis in the course of future proceedings. CN continues to believe (as do many others) that the Board would be well-advised to follow here the approach that it has taken with the related subject of safety integration plans ("SIPs"). The basic requirement has evolved through case-by-case adjudications based on a relatively simple list of subjects to be addressed, not by prescriptive rules. When the Board and FRA did attempt to adopt detailed, prescriptive rules for SIPs such as are advocated for service integration plans by some of the commenters here, the several rounds of

comments in that proceeding showed that well-intentioned, seemingly innocuous proposals can impose burdens out of proportion to their benefit.[2] This case-by-case approach should at least be tried in the next consolidation proceeding, which could shed light on whether that approach is still workable as to this subject, before the Board decides that formal rule changes are required.

CN also suggested that, if the Board concluded that it should amend its rules now to address this subject, it could essentially impose in such a rule the same requirements that CN outlined for case-by-case development. It could thus require that the application: (a) include a service integration plan (such a plan should, among other things, be dynamic in nature and outline the applicants' staged approach and contingency plans for implementation); (b) demonstrate the applicants' financial viability and their ability to provide needed infrastructure, to respond to service problems, to avoid adverse impact on its cost of capital, and to be able to proceed with measured implementation, not rushed by financial pressures; (c) disclose the extent to which any of the applicants may be suffering from service problems associated with a previous merger; (d) compare and contrast the proposed transaction with prior consolidations that have been associated with major service problems; (e) outline the applicants' plans for terminating, reassigning, or making other material changes in personnel; and (f) in order to protect against the risk that problems might develop, demonstrate a commitment to provide some appropriate guarantee of service for the crucial first years of implementation.

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[2]Comments of AAR and Member Freight Railroads, Regulations on Safety Integration Plans, STB Ex Parte No. 574 (filed Mar. 1, 1999).

CN's approach bears many similarities to that of DOT and a number of other commenters.[3] We note the rather dramatic differences in the perspectives of CSX and NS, who both faced similar difficulties in their implementation of the division of Conrail, which NS aptly observes was more complex and difficult than any rail consolidation transaction likely to be seen in the future. NS, which says that its service problems "were relatively short lived and, today, are largely behind it,"[4] urges with the support of its experienced operations personnel that the Board avoid overreacting by over-regulating. CSX, which is not yet out of the woods as to service, has gone in the opposite direction, urging a variety of new prescribed plans (i.e., in addition to an integration plan, a "Capacity Plan," and a "Rolling Stock Supply Plan"); review of plans by consultants before and after approval, (which the applicants would be required to pay for); termination of contracts; etc. CSX at 13, 16-17. CN finds the NS approach concerning the Board's role in evaluating merger implementation plans to be more appropriate overall.

Among the premises underlying CN's proposal is the recognition, heightened by Ex Parte No. 582 itself, that combining railroads have enormous self interest in acting prudently to avoid the problems of the past and to retain and regain the confidence of their customers. Market pressures should lead to the optimum balance between securing expeditiously the public and other benefits from a transaction and bearing such expense as may be essential in minimizing the risk of service problems. In this connection, the events following the UP/SP and CSX/NS transactions in particular will heighten any railroad's concern about its approach to the potential

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[3] E.g., NS, CP, CMA & APC, DuPont, ECTA, GM, NY, and PP&L.

[4] NS at 21.

problems of implementation. That has certainly been the experience of CN in addressing its proposed combination with BNSF.

The stated goals and purposes of most of those who commented on this subject would be taken into account and well served by the approach suggested by CN. Moreover, that approach would effectively serve the Board's needs in assessing the public interest, without entailing or imposing as much cost and delay, or bureaucratic burden, as would likely characterize the other, more-prescriptive, intrusive proposals. In dealing with railroad operations, the Board should recognize the importance of a regulatory framework that preserves flexibility and adaptability for those on the front lines running the railroads on a day-to-day basis. The Board should be particularly wary of proposals calling for prior review or approval of detailed implementation plans after the Board has approved the transaction (whether by the Board or by "consultants" for whom the applicants were required to pay) with all the delay and expense entailed by such processes, or by "detailed simulations" or other such experimental actions[5] that are likely to be at best of marginal value to the Board or to the railroads.

Some have noted the useful role of the Conrail Transaction Council in dealing with problems that arose with the implementation of the division of Conrail.[6] CN supports this concept, although we do not believe that a formal rule is needed to implement it as to a particular consolidation, since the purposes and composition of such a body may vary from one transaction to another.

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[5]CSX at 11, 13-16; WE at 43, BASF at 62, OxyChem at 51.

[6]DOT at 6, CSX at 12.

With respect to service guarantees, this is an area that is quintessentially one for the market to resolve the particulars, rather than for elaborate prescription by the Board. It is the affected shippers who (other than the combining railroads themselves) have the greatest stake in having in place a remedy structure that (1) will do right by them in the event of serious service problems, (2) will provide incentives for the railroads to do all that they can reasonably be expected to do to assure at least a continuation if not an improvement in the level of service, but (3) will not impose such added costs as to jeopardize the financial well being of the railroad or otherwise create pressures for increased revenues.

Service guarantees will entail some pertinent set of service measurements. These, too, and the necessary assessment of the costs and benefits of particular service data, are best addressed by the parties primarily involved – railroads and shippers – either between themselves or perhaps through negotiations by industry groups. Absent a proven failure of other approaches, there is no need for the Board to undertake the task of prescribing such measurements or information reporting requirements, and the Board should be cautious about any such undertaking. The provision of information in a form not already regularly generated for internal use is not a cost-free undertaking. Different shippers have different needs and interests in this area, and the Board should look to negotiations between the affected parties to identify the information that is useful and can be efficiently provided. Several shippers, for example, have urged more shipper-oriented measurements of performance.[7] These measurements would be better suited to formulation through private discussions and negotiations related to a particular transaction.

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[7] E.g., MWBC at 7, NDGDA at 4. See also CPUC at 6.

For example, CN would suggest as a reasonable approach a service guaranty entailing in general a base-line pre-transaction service level; criteria for measuring post-transaction performance; defined categories and causes of service failure; specification of movements covered (e.g., those on the lines of or within the control of the combining carriers); and a set of defined contractual remedies, which could include, e.g., rebates, discounts, relief from volume commitments, access to alternative carriers).

Existing law provides substantial remedies to shippers concerning service problems caused by merger implementation, particularly as to the great bulk of movements where the service is governed by contract.[8] The Board recently added to such remedies in Ex Parte No. 628, which few commenters even mentioned, and none showed to be inadequate. Exposure to these remedies provides ample incentive for merging railroads to get it right. There has been no demonstration of a need for the Board to design or impose any additional remedies.

It is common for transportation contracts to provide for arbitration, and no commenters demonstrated any need for the Board to impose a further or different remedial scheme than the parties have agreed upon.[9] Of course, in appropriate cases, the parties may be able to seek arbitration under the Board's existing rules. 49 C.F.R. part 1108.

Some commenters urge a requirement of consultation with passenger service organizations.[10] Here, too, a specific prescription seems unnecessary. This type of preliminary

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[8]See GAO, Railroad Regulation: Changes in Railroad Rates and Service Quality Since 1990 3 (1999).

[9]It is not clear why, for example, CSX's suggestion of a non-binding mediation service should be limited to merger implementation.

[10]DOT at 7, APTA at 5, Metra at 5, N.J. Transit at 1.

communication can be expected to occur naturally in the ordinary course. If the Board requires anything, it should be no more than that the application refer to such consultations as have occurred.

A vague concern has been raised about abandonments related to mergers.[11] However, no showing has been made as to any particular inadequacy of the Board's rules on abandonments generally or merger-related abandonments in particular.

A number of commenters use the heading of "safeguarding service" as a vehicle for pressing other proposals that are really separate agenda items, and not necessarily merger-related, such as access,[12] confidentiality of contract terms,[13] and rate increases.[14] Our comments on these subjects apply here, too.

II. DOWNSTREAM EFFECTS

Under its governing statute, the Board must approve any transaction that is consistent with the public interest and must disapprove any transaction that is not consistent with the public interest. The proponents' argument for consideration of downstream transactions is that a pending transaction and a downstream transaction, each of which is consistent with the public interest considered on its own, are not in the public interest when considered in light of each other. This argument is inherently implausible -- that the whole is less than the sum of its parts so that two good transactions add up to one (or two) bad transactions. For that and other reasons,

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[11]DOD at 5.

[12]E.g., ARC at 5.

[13]SSC at 1.

[14]E.g., SPI at 11.

as CN described in its opening comments, the expansion of regulation urged by proponents of repeal is very unlikely to bring benefits that will outweigh its costs. CN at 21-28. The all too likely result would be to complicate control proceedings and to stifle or delay increases in competition and innovation.

There should be no lack of clarity as to what is at stake here. The railroads urging the Board to consider hypothetical transactions and hypothetical industry structures want to control the timing and use of mergers as a competitive tool.[15] They want a regime in which nothing can happen until everything is decided by the Board with the participation of each of the railroads. They want a regime in which it becomes possible to say anything because it is all about hypotheticals; a regime in which a consensus of competitors becomes the practical requirement for further structural change. These railroads want, through the Board, to control the timetable for structural change, and the railroads still in trouble want insulation from further competitive pressure. All of this central planning approach has more than a whiff of the days of rate bureaus and DT&I conditions; it is protectionist and thereby inherently anticompetitive to its core.

These protectionist regimes are not only ill-advised, they are entirely unnecessary. CN feels constrained once again to stress the obvious: no adverse effects can occur from railroad mergers unless those mergers are approved by the Board. And there is no reason to suppose that the Board is going to approve downstream mergers that are inconsistent with the public interest just because it has approved "upstream" mergers that are consistent with the public interest. The Board should refuse these invitations to engage in central planning based solely on speculation

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[15]NS, without proposing an alternative rule or specifying any particulars, urges the Board to repeal the present rule and examine "likely" downstream and cross-over effects. NS at 52.

and focus on the facts presented in the cases actively before it and judge each merger as it is proposed, on its own merits.

A. CN's Proposal: Transaction-Specific Orders

The comments urging the Board to repeal the one-case-at-a-time rule and consider not only downstream effects but hypothetical transactions and hypothetical industry structures (the transcontinental "duopoly") fail to provide the Board with any alternative rule that would be defensible as policy or workable in practice. They urge approaches that would be beyond the Board's authority, would enmesh the Board in the consideration of transactions that may never occur, about which important particulars cannot possibly be known, with respect to questions whose answers -- whether yes, no, or maybe -- could not be expected to provide a lawful, logical basis for the Board to deny approval of a pending transaction that it otherwise would have approved, or to condition its approval with conditions that it would not otherwise have imposed, or to approve a transaction that it otherwise would have denied. Thus, although consideration of downstream transactions with proper adherence to applicable legal constraints is unlikely to have a significant bearing on the final outcome of the Board's consideration of a pending transaction, the effect will still be to impose tremendous burdens and risks that will disadvantage the pending transaction, harming shippers and legitimizing a protectionist regulatory regime.

CN proposed that the Board, instead of repealing the present rule, amend its waiver rule to allow any party to a merger proceeding to petition for waiver. That is the mechanism the Board should adopt for consideration of downstream transactions. CN believes that many of the parties that urged repeal of the downstream rule, but without elaboration or suggesting an alternative rule, were simply asking the Board to lower the bar on entertaining evidence of

downstream transactions. CN's proposal would meet that concern in a manner that is consonant with the statute and that would enable the Board to remain in control by crafting orders tailored to the circumstances.

In evaluating the appropriate course of action, the Board should note that the majority of shippers and other non-Class I carrier stakeholders did not call for any change in the Board's treatment of "downstream effects;" many of these commenters did not even address the subject in their comments,[16] while others noted the complications that such an undertaking would present.[17] Other commenters expressed a general opinion in favor of the Board considering "downstream effects,"[18] or specifically advocated repeal of the current rule,[19] but offered no specifics on an alternative rule or how it would work. Finally, some equated consideration of "downstream effects" with service or competition issues already properly considered in control proceedings as a matter of course (e.g., AAM at 6, Shell at 10-11, AAPA at 4-5). These comments provide no basis for the Board to repeal the current rule or choose a means other than the defined, focused approach for handling "downstream" issues that CN proposed.

If, as CN has proposed, a party is able to request waiver of the rule in a particular proceeding, the Board will have the opportunity to learn what evidence the party wishes to introduce or expects to discover; why the party believes that the evidence would be probative;

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[16] E.g., Tex-Mex, DM&E, CPUC, NY State, NJ Transit, Toyota, POSTE, ARC, CURE, SPI, NMA, Ameren, EMEC, TFI, AFBF, AFPA, CFI, NWFA, NRLC, and CRI.

[17] E.g., WCS at 13; WE at 5-6; FGLK at 16.

[18] E.g., GM at 1, PPG at 2, WyCo at 6, NGFA at 5-6.

[19] E.g., CMA & APC at 18, RLD at 2-3, CPPA at 6, ECTA at 7-8.

why the party believes that the downstream transaction would be an effect of the pending transaction; why the party believes that such evidence may support a conclusion that, in light of some downstream transaction, the pending transaction or the downstream transaction is not in the public interest or must be significantly conditioned; and why the party believes that the Board's consideration of the evidence will not jeopardize the manageability of the proceeding or the statutory deadline. The context of a specific transaction will enable the Board to assess the plausibility and seriousness of the concerns, and to craft an exception accordingly, taking into account surrounding questions relating to disclosure of the most sensitive strategic information, SEC concerns, and other as-yet unforeseeable issues that will inevitably arise.

A petition for waiver might reveal that the party's concerns do not require consideration of downstream transactions. For example, AAM believes that further consolidation may have a "detrimental effect upon competitive access and service levels." AAM at 6. Those concerns may be met through the Board's evaluation of competitive effects, service integration, and the operating plan. It is not at all apparent why those concerns require the Board to consider downstream transactions. IMPACT's concerns (at 15) about possible foreclosure of "friendly" east-end connections for a new railroad that might be built into the Powder River Basin likewise do not require consideration of downstream transactions. Similarly, DOT's support of repeal of the current rule rests in part on concerns with impacts on "'orphan' railroads, left without suitable partners, and the effect such a state would have on the shippers that they serve." DOT at 36. Whether DOT means that the Board should protect a competitor rather than competition (which the Board has correctly declined to do in the past), or should protect only "essential services," neither requires consideration of downstream transactions.

The consideration of downstream transactions is too fraught with anticompetitive potential, too likely to impose regulatory costs that outweigh any regulatory benefits, and too little understood, for the Board to crystallize a more lenient policy into a rule. A rulemaking proceeding will not overcome these inherent difficulties, which the Board can only hope to control through carefully designed orders in specific transactions.

B. The Lack Of Legal or Practical Justification For The Proposed Expansion Of Regulation

Each of the parties urging the Board to repeal the present rule ignores a basic test for such an expansion of regulation: whether its costs will outweigh its benefits. Each also leaves unanswered some or all of the most basic questions relating to such an expansion of regulation, such as: which transactions would the Board consider; by what evidence would the transactions be identified; who would have the burden of coming forward with such evidence; what would be examined with regard to those transactions; what would be the effects on the quality of information in Board proceedings and their manageability; how would the Board discount for the greater uncertainty of downstream transactions relative to the pending transaction; what legal consequences for the pending transaction or downstream transactions would result from the examination of downstream transactions, and would those consequences be lawful under Section 11324 (for example, could the Board condition its approval of the pending transaction based upon reasons relating to the downstream transaction, or could the Board announce in the pending proceeding the conditions that it would impose, based on reasons relating to the pending

transaction, on any future approval of the downstream transaction); and what should happen if the downstream transaction is not approved or is not consummated.[20]

Most fundamentally, proponents of repeal fail to explain how the necessary causation could be established under the expansion of regulation that they urge. The Board cannot require merger applicants to present evidence on public costs that are not related to behavior of the merging carriers any more than it could approve a merger on the basis of public benefits that have no nexus to their behavior.[21] It would be illogical to deem adverse effects of a downstream

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[20]DOT states that applicants could be "encouraged to offer an analysis of why their particular combination offers benefits that would not be generated by a merger of either with a different partner, or poses fewer risks than another combination." DOT at 36. CN pointed out in its opening comments that it would be both unworkable and beyond the Board's authority to assume the role of a central planner that determines not only whether a pending transaction is consistent with the public interest but whether "it is the best transaction from among all possible permutations." CN at 23. DOT itself recognizes that "the Board should not let the quest for the 'perfect' rail industry structure prevent approval of combinations that provide good, competitive and innovative service at reasonable rates. It is ultimately the marketplace, not the STB, that should shape the structure of the rail industry." DOT at 37; see MCI v. FCC, 627 F.2d 322, 340-42 (D.C. Cir. 1980) ("The best must not become the enemy of the good, as it does when the FCC delays making any determination while pursuing the perfect tariff"). There is, in fact, little or no tension between these approaches. As Dr. Christopher Vellturo described, if, by reason of the Board's proven approach to merger review, merging parties have no reasonable prospect of accruing market power, their choices of merger partners will maximize public as well as private benefits from among available transactions. CN at 74-75 (Statement of Christopher A. Vellturo).

[21]BNSF, which did not advocate but said that it had no "conceptual objection" to repeal of the present one-case-at-a-time rule (BNSF at 13), cautions against any attempts to analyze "speculative possibilities" (BNSF at 14); similarly, CP states that it would be inappropriate to consider "hypothetical future transactions that might never occur." CP at 7. BNSF suggests that applicants be required to supplement their application with evidence relating to cumulative operational or competitive effects from any transaction for which definitive SEC filings are made prior to the date on which initial intervenor testimony is due. BNSF at 15, 41. CP would not impose the burden of coming forward on applicants, but would have the Board consider "issues raised by interested parties" relating to "responsive transactions that actually materialize during the course of the first proceeding." CP at 7.

transaction as an effect of an earlier merger, because the Board need not approve the second merger. The Board's approval authority breaks the chain of causation.[22]

C. The Protectionist Goals and Impact Of The Proposed Expansion Of Regulation

1. The Inherent Bias Against the First Transaction. Any consideration of a downstream transaction is necessarily biased, to the inherent detriment of the pending transaction in the public interest calculus. Those advocating consideration of a downstream transaction would have the Board "debit" the pending transaction for adverse effects relating to the downstream transaction, but would not "credit" the pending transaction for public benefits from the downstream transaction. Yet, if the costs of the downstream transaction are "effects" of the pending transaction, so are the benefits of the downstream transaction.

CN believes that the Board cannot lawfully take into account transactions that are not an "effect" of the pending transaction, and, in any event, should not do so. See CN at 23-24. CN further believes that consideration of a downstream transaction should never be automatic; the burden of coming forward with evidence of cumulative effects should rest with the parties asserting that an announced downstream transaction is unambiguously contingent on consummation of a pending transaction and bears materially on whether a pending transaction is in the public interest. CN at 26-27. Accordingly, CN urges the Board simply to widen the class of persons that may petition for waiver of the current rule, giving the Board an opportunity to craft an order tailored to the circumstances and the nature of the claim, and with due regard for the manageability of proceedings and the statutory deadlines.

[22]Conceivably, an application for a second transaction might be filed during the pendency of an earlier transaction. CP suggests that, in "appropriate circumstances," the Board might consolidate the proceedings on applications filed during the course of the first proceeding. CP at 7-8; see also UP at 5. CSX would have the Board adopt a rule that it will "to the fullest extent possible consolidate for joint development and consideration any two or more applications for transcontinental combinations." CSX at App. H-7; see also DOT at 36 ("mergers proposed within a reasonable time period of each other should be combined and assessed together"). The consolidation of already-massive proceedings subject to strict statutory deadlines, and under a standard that requires the Board to approve any transaction that is consistent with the public interest, would raise a host of issues, both legal and practical. Consolidation should be left to the concrete circumstances, if and when they ever arise.

There is no satisfactory way to overcome this inherent bias against the pending transaction, because the determination of net public benefits from the downstream transaction would require completion of an evidentiary proceeding concerning the downstream transaction. The practical effect is that, in a pending proceeding, the Board would make findings about the downstream transaction that would work to the detriment of the pending transaction, but those findings could be ignored in the subsequent proceeding to consider the downstream transaction (if indeed an application for the downstream transaction ever is proposed to the Board for approval). The pending merger might be denied or conditioned on the basis of conclusions about the downstream merger, but the parties to the second merger would be free to advocate different positions in the separate proceeding on their merger, where more realistic and specific evidence would be presented, and the Board could reach entirely different conclusions, presumably on the basis of this better evidence, or subsequent settlements or other changed circumstances. The downstream transaction gets two bites at the apple, and one of those bites is out of the pending transaction.

The entire CSX concept, for example, accords privileged status to the downstream transaction. According to CSX, the Board should consider the impact of the pending transaction "on other proposed mergers, and the effect of the various transactions as a whole. The public interest may require the Board to condition its approvals on contingencies with respect to other proposed transactions." Id. at 11. In other words, if the pending and the downstream transaction would interact in such a way as to have adverse effects on the public interest, the pending transaction must accommodate the downstream transaction; and the burden of amelioration

would fall on the pending transaction.[23] Similarly, CP states that the Board might exercise its reserved jurisdiction with respect to the first transaction in order later to impose conditions on the first transaction "if adverse cumulative impacts were to arise as a result of the second transaction." CP at 8 (emphasis added). By ignoring the Board's ability to deny or condition its approval of the second transaction, these railroads seek a scheme that is inherently biased against the earlier transaction.

Timing is part of competition. Those who see an opportunity and are ready to propose and efficiently implement a pro-competitive merger should be able to gain the competitive advantages of doing so, in turn accelerating the realization of shipper benefits. This choice of timing is central to the private initiative that Congress preserved in the Staggers Act. Of course no such competitive gains can be permanent; a merger causes the competitive struggle to intensify, as other railroads and other modes compete through price or service innovations; investments in information technologies, equipment or facilities; alliances; or other mergers.[24] But they should not be denied or discouraged.

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[23]In a separate proposed rule amendment, CSX would have the Board consider the "impact of potential or reasonable hypothetical combinations or transactions on the consolidation or consolidations under consideration, and *vice versa.*" CSX App. at H-7. The "*vice versa*" does not change the bias toward the pending transaction. It is not realistic to believe that the Board could identify specific effects of a hypothetical transaction on a pending transaction, or that it could or would announce in the pending transaction hypothetical conditions that it would impose in the hypothetical transaction.

[24]Contrary to the suggestions of railroads opposing the BNSF/CN merger, timing advantages do not include gaining merger approval under "old" rules. As BNSF and CN have made clear in their filings with the Board and in the Court of Appeals, the Board's adjudicatory processes have evolved in the past and can continue to evolve to reflect current concerns and issues. See Stay Pending Judicial Review at 1; Joint Brief for Petitioners at 3, Joint Reply Brief for Petitioners at 15.

What the proposals of the railroads urging consideration of abstractions and hypotheticals add up to is a protectionist strategy to disadvantage the pending transaction by forcing the pending transaction to bear all of the burdens associated with the consideration of downstream transactions, including not only the vastly increased complexity, delay, and uncertainty in the proceeding itself, but all conditions that may be necessary to offset adverse effects arising from the interaction or combined effects of the two mergers. Adverse effects on the public interest that would not occur but for the hypothetical downstream transaction are nonetheless attributed for conditioning purposes wholly to the pending transaction. No proponent of such a measure explains why an adverse interaction between a pending and a putative downstream transaction is a problem only of the pending transaction and not of the downstream transaction under the public interest standard. Proponents of these measures are seeking to enlist the Board in a protectionist strategy that is indefensible.[25]

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[25]CSX proposes (CSX App. B) a rule under which the Board could dismiss an application on the ground that it would not be consistent with the public interest "for the transaction to be considered or approved" because of "temporary conditions in the industry." The Board, of course has no authority to dismiss an application without even considering the public interest required under § 11324. This proposal also reflects CSX's mistaken view that the test under § 11324 is not only whether a transaction is in the public interest but whether the proceeding in which that determination is made is also in the public interest. CSX's suggestion that the Board could deny approval of a transaction because of "temporary conditions" is simply another variant of its protectionist theme that shippers should be denied the benefits of increased competition from an efficiency-enhancing merger that is in the public interest because other railroads are having service problems. Indeed, under this perverse standard, a major railroad could cause the dismissal of a pending merger application by creating service problems.

2. The Intractable Evidentiary And Analytic Problems Involved In Consideration Of Downstream Transactions.

Two especially protectionist proposals, of Byzantine complexity, from CSX and UP, demonstrate the folly of the central planning approach to merger review.

CSX's Proposal

CSX's proposal would make any Commissar proud. In the tradition of 5-Year Plans that preceded the great collapse, CSX would require applicants to offer evidence relating to any "transcontinental" transactions that are "proposed or that are reasonably likely to be proposed in response to the transaction." CSX App. G.[26] CSX does not identify what the standard for that determination will be, or what it means by "in response to the transaction."

The idea of requiring applicants to present evidence on "reasonably likely" transactions that would be "in response" to the pending transaction and that would "create or augment" transcontinental systems is untenable. The CSX proposal is an attempt to burden the BNSF/CN proceeding; from the perspective CSX advocates, there are at least five conceivable "responsive" transactions: UP/NS; UP/CP; UP/NS/CP; UP/CSX; UP/CSX/CP. A transaction with KCS would "augment" any of these transcontinental transactions, thereby increasing the number to ten. As WCS states: whose crystal ball will the Board use?" WCS at 12. How is an applicant in the pending transaction to know which, if any, of these transactions is "reasonably likely" or "in response"? And how could any evaluation of such potential transactions ultimately be

[26]CSX would define "transcontinental transaction" as a transaction involving two or more Class I carriers that would "create or augment a system of rail carriers serving both the East and West coasts of the North American continent." CSX App. A.

reconciled, when many of them involve premises that are mutually inconsistent with one another?[27]

There is no conceivable basis for imposing on applicants this burden of trying to determine which downstream transactions might be "reasonably likely" as a "response" to the pending transaction, when it is the potential parties to other possible transactions who know best what their economic interests and intentions are. Applicants should not have to guess about the intentions of other parties who can speak definitively on their own behalf. It would turn the Board's merger control proceedings into a game if the Board required applicants or other participants in a pending proceeding to offer evidence about likely strategic responses to the pending transaction, when the parties to the supposed strategic response know perfectly well what their intentions are.[28] Nor would these parties have any incentives to contest the applicants' selection; the more transactions that are "reasonably foreseeable," the greater the applicants' evidentiary burden.[29]

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[27]For example, a UP/NS merger would have effects different from a UP/CSX merger. In attempting to judge the ultimate downstream effects of a BNSF/CN combination, would the Board choose between those two competing hypothetical scenarios? Which would it choose? And if it did not choose, how could it make any principled ultimate judgment about the downstream effects of both hypothetical transactions when they are mutually exclusive?

[28]Any venture into litigation around the strategic plans of competitors is fraught with risk. As BNSF points out, access by merging railroads to the strategic plans of their competitors is something that "might be unlawful and that neither the Board nor the industry should favor." BNSF at 14.

[29]In addition, parties and the Board would have to distinguish transactions that are reasonably likely as a response to the pending transaction and transactions that are reasonably likely as a response to market forces apart from the pending transaction. As Dr. Vellturo pointed out, such "an undertaking would be virtually impossible." CN at 82 (Vellturo Statement).

Other major carriers' insistence that most if not all merger benefits can be achieved by lesser collaborative ventures would make it even more difficult for an applicant to divine which responsive merger transactions were "reasonably foreseeable." This view that mergers are not needed to achieve merger-like benefits was expressed repeatedly in the Ex Parte 582 hearing. As described by UP's Dick Davidson, UP is looking at many cooperative ventures that UP believes will bring the same results:

> In fact, we're looking at exactly the same kind of benefits that the BN-CN have announced through joint ventures and by working more closely together. We're looking at such things as joint data centers, joint software development, joint purchasing joint interline service design, sharing of facilities and common terminals, joint telecommunication systems, joint car repair, and locomotive repair, interline service with the CP which has been instituted today and finally, proving that the lamb can lay down with the lion, we have cut three deals with the BN Santa Fe for joint dispatching ... and plan our fourth.

3/7/00 Tr. 205.

Other carriers agreed, expressing the view that new e-commerce and other collaborative initiatives short of merger can bring comparable benefits to shippers. E.g., 3/7/00 Tr. 198 (NS/Goode); CSX Ex Parte 582 Statement at 8; CP Ex Parte 582 Statement at 5.[30] Just last month, these carriers announced a new strategic alliance, known as Arzoon, that they claim will create "a virtual transcontinental railroad electronically without a full merger," in the words of alliance participant UP. Omaha World-Herald (May 14, 2000); see May 23, 2000 Press Release (CEOs of CP and CSX emphasizing the seamless transcontinental service that it is claimed the alliance will provide, despite the fact that it will not eliminate interchanges.) If proposals such as

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[30]CSX's suggestion in its Ex Parte 582 statement that "the industry is distracted from exploring [such collaborative ventures] now" by the BNSF/CN combination proposal (id.) is belied by the recent announcement of its Arzoon alliance with UP, CP, and NS.

Arzoon do bring the same benefits of merger – as its participants suggest – they would of course have no need to consider future mergers and there would be no need for the "downstream transaction" rule they urge the Board to adopt.

At the same time, however, these carriers have suggested that BNSF/CN would cause them to "reconsider" their position that future mergers are not needed, (e.g., Davidson Ex Parte 582 Statement at 6 (UP); 3/7/00 Tr.175 (CSX/Snow)), even while insisting that they don't need a merger to meet the competition BNSF/CN would present. See Davidson Ex Parte 582 Statement at 1 ("We are confident that we can compete against CN/BN, working in cooperation with CP and other carriers.") see also id. (UP does not believe it must be as big as any other railroad to compete); 3/7/00 Tr. 202 (UP/Davidson: "We don't expect their merger to have a major ... effect on their ability to compete. We know that we can compete effectively with Burlington-CN if they were to put their deal together. . ."). Finally, at least one carrier underscored that it would not foreclose the prospect of a future merger judged to be in the best interests of its customers and shareholders. As stated by CP CEO Bob Ritchie, "the wisdom of that transaction will depend on the needs of our customers and the relative pros and cons of merger versus alternative means of meeting those needs." 3/7/00 Tr. 162.

What could an applicant that must identify "reasonably foreseeable, responsive" transactions, or the Board that must make reasoned findings, make of this state of affairs? CN believes that alliances can go only so far, and that certain mergers are the only means fully to realize the great bulk of untapped system efficiencies for the benefit of shippers. How can CN reasonably be asked to divine the intentions of railroads that insist that mergers are not necessary because other means exist to achieve their benefits, while equivocating that they may

"reconsider" these views at a future point in time, despite the fact that – in the judgment of UP, a carrier who would be directly affected by a combined BNSF/CN – a responsive merger is not needed to meet the competitive challenge of a combined BNSF/CN? Merger applicants cannot possibly assess other carriers' intentions in light of these points of view. As one rail CEO acknowledged at the hearing, we simply "don't know" what transactions might result. 3/7/00 Tr. 221-22 (CP/Ritchie).[31]

As an adjunct to the burden of divination that CSX wants the Board to impose on applicants, CSX also proposes a rule that would require applicants to submit any studies that they made or commissioned and that were created within the 120 days prior to the notice of intent, relating to "possible transcontinental combinations, whether involving the applicants or other carriers." CSX at App. G. This curious proposal further reveals CSX's single-minded goal of embedding protectionist biases against applicants into the Board's rules. If CSX really were concerned about reasonably likely responses to a pending transaction, the best evidence to require would obviously be studies commissioned by the possible parties to those other transactions, such as CSX, that were created within a reasonable period prior to the first public announcement of the pending transaction and, importantly, a reasonable period following it. If the Board were to open its proceedings to consideration of downstream transactions, a rule of this type would make no sense unless it required such studies from all major railroad parties to the pending proceeding.

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[31]As Mr. Ritchie elaborated, he would not say that BNSF/CN would "automatically force" a transcontinental merger in the U.S. "[C]ombinations could take place and whether those combinations would eventually lead to an East-West, I'm not sure." Id. at 221.

Finally, in a separate proposed rule amendment, CSX would have the Board consider "potential or reasonable hypothetical combinations." CSX at App. H-7. This standard, which is even more extreme than the iterations discussed above, contains a notion – "potential" – that apparently is even broader than "reasonably hypothetical." Such a rule, by opening the door to assertions about "potential" or "hypothetical" transactions, would magnify all of the difficulties discussed above and in CN's opening comments relating to the consideration of downstream transactions. For all of the same reasons, it is both unworkable and beyond the Board's authority.

2. UP's Proposal

UP's proposal is even more grandiose than that of CSX. UP offers the Board the ultimate central planning role: UP asks the Board to require applicants proposing a major transaction to "evaluate the effects on competition and the public interest of combining all Class I railroads in the U.S. and Canada into two North American Class I railroads." UP at 5. As an example, UP states that applicants would have to address whether "a single railroad serving Florida, the Northeast, Western Canada, and California would be manageable and responsive to its shippers." Id. UP acknowledges that to analyze all "possible permutations" would "involve too much speculation." Id. Despite its professed aversion to speculation, UP proposes, apparently without irony, to turn each control proceeding into a seminar on the abstract question "whether a two-railroad North American rail system would be in the public interest." Id.

The only possible response to the question of whether two North American Class I railroads would be in the public interest is "it depends." Based on the supposition that today's railroads will not change (which is only remotely plausible), there are at least 8 conceivable

outcomes in which all Class I railroads in the U.S. and Canada would have been combined into two North American Class I railroads: (1) BNSF/CN/CSX and UP/CP/NS; (2) BNSF/CN/NS and UP/CP/CSX; (3) UP/CN/NS and BNSF/CP/CSX; (4) UP/CN/CSX and BNSF/CP/NS, each with and without KCS. Any of these outcomes would require a number of merger proceedings and Board approvals.

Under UP's proposal, the abstract question would be examined repeatedly, in each proceeding. Thus, the Board might conclude in one proceeding that a two-railroad structure is consistent with the public interest, and, in a subsequent proceeding, that it is not, or *vice versa.* UP does not specify what the consequences of these determinations would be for the pending transaction. UP cannot do so because there is no necessary link between any possible answer to the abstract question – yes, no, or maybe – and the determination whether a pending transaction is consistent with the public interest. The requirement that UP would impose on applicants would not depend on any such link. Further, the Board could not lawfully approve or disapprove a merger application on the basis of any answer to the question.[32]

Section 11324(c) states that "the Board shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest." What UP invites the Board to do is to require applicants that otherwise can demonstrate that their particular transaction is "in the public interest," to demonstrate that, as an abstract proposition, two North

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[32]Similarly, EEI states that, because "the Board has found that the 'final restructuring' of the railroad industry would lead to two large railroads, that outcome must be considered in every major rail consolidation proceeding." EEI at 2. Besides resting on a finding that the Board has not made, EEI's suggestion, like UP's, fails to identify how such consideration could cause the Board to deny approval of a merger that it otherwise would have approved, or to approve with conditions a merger that it otherwise would not have imposed, including a merger that is not between an Eastern and a Western U.S. railroad.

American rail systems would be in the public interest. The answer to the first question does not depend upon the answer to the second, and to make it dependent would violate Section 11324(c) and create the possibility of inconsistent results, to the lasting detriment of shippers. See CN at 23-24 & n.10.

Further, the question is impossible to answer in the abstract. Thus, DOT, which is concerned with the implications of two transcontinental railroads, states: "We cannot predict whether such an industry structure is *per se* good or bad for the transportation system and the country. Much depends on the circumstances of future individual transactions." DOT at 1.[33] This point is amply confirmed by UP's own example of what applicants would be required to address: the manageability and shipper-responsiveness of a railroad that operates in Florida, the Northeast, Western Canada, and California. Obviously there is no abstract answer to that question; it is a function, among other things, of such transaction-specific matters as management history and track record, organizational structure, prior presence in these markets, and information technologies (which, as UP emphasizes elsewhere, are rapidly evolving).

The same is true of any other element of the public interest -- such as operational, safety, environmental, and competitive issues. The answers depend, for example, upon the

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[33]DOT candidly recognizes that weighing the impacts of "potential" mergers "against the benefits of the consolidation at hand" does not "lend itself to verifiable evidence, quantification, and expert testimony." DOT at 36. DOT would nonetheless have the STB attempt in each merger "to focus on the 'downstream' effects that consolidation would have, however illusive, on an already concentrated industry." DOT at 4. CN respectfully submits that the Board, whose merger decisions have much to do with whether increasing competition and innovation will continue to characterize this industry, cannot be in the business of denying, conditioning, or approving, mergers on the basis of "illusive" speculations unsupported by verifiable evidence, quantification, or expert testimony.

characteristics of the parties that ultimately merge to create the two systems; they depend upon which other mergers preceded the "duopoly" transaction; they depend upon the geographic areas and product markets that will be affected by the proposed transactions; they depend upon the extent of intermodal competition in particular regions of North America; and they depend upon the conditions that might be imposed in order to ameliorate any adverse effects and whether such conditions are able effectively to do so. The analysis that UP would have the applicants perform depends precisely upon the specifics that UP admits are too speculative to deal with today because there are "too many possible permutations."

D, The Alternative Of An Informational Hearing On Transcontinental Issues

CN believes that the Board should deal with the question whether a transcontinental railroad would be in the public interest when the Board is presented with a proposed merger involving a Western and Eastern U.S. railroad, and that the Board will then be able to evaluate that question effectively and accurately in the context of that proceeding. However, should the Board believe that it needs to become better informed in advance about the ramifications of a two-railroad North American structure, it should initiate the expedited informational proceeding suggested by CN in its opening comments. As CN stated, the informational proceeding would be for the purpose of "hearing views and enriching the understanding of the "duopoly" question by the Board and all railroads and their constituencies. That inquiry would not likely lead to writing rules or guidelines. Instead, it would draw into one forum the best information and analyses that are available in advance of a proposal for a particular East-West transaction." CN at 20.[34]

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[34]Virtually all of the opening comments of parties urging Board to consider a transcontinental duopoly contain no suggestion as to what, in particular, the Board should consider. The concerns that were identified could not be resolved outside the context of a

On the basis of the informational record, "potential applicants for an East-West transcontinental transaction would evaluate their options and frame any transaction accordingly. If such an application were presented, the Board would evaluate the merits in light of the knowledge gained (which might include the knowledge that the Board's longstanding approach to individual mergers remains the proper approach in the transcontinental context). The Board could also evaluate its present rule on downstream effects at the conclusion of the informational proceeding." Id. at 20-21.

III. MAINTAINING SAFE OPERATIONS

Relatively few commenters addressed this subject. Nearly all of those that did essentially concurred with the Board's view that there is no need for the Board to propose a rule in this proceeding on this subject. The Board should instead continue its present practice of requiring safety integration plans in conjunction with FRA, subject to such rules as the Board and/or FRA may adopt in the pending rulemaking on this specific subject. Ex Parte No. 574. The principal exception is the RLD/AFL-CIO, joined by several other labor organizations, which proposed several changes to the rules beyond those suggested in Ex Parte No. 574.

One RLD proposal is to add "unsafe operations" in the listing of potential harms from a consolidation that would ill-serve the public. This seems unnecessary but otherwise appears unobjectionable.

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specific proposal for a merger between an Eastern and Western U.S. railroad. In an informational hearing, however, the Board could explore, to the extent it is possible to do so in the abstract, such matters as CMA's concern that transcontinental mergers will close gateways and therefore reduce shipper routing options (CMA at 9); and the suggestion of OxyChem's witness, which OxyChem is not itself prepared to adopt, that fear of driving the other railroad from the market might cause two railroads to compete less vigorously than if there were more railroads (OxyChem at 10-11).

A second RLD proposal is to require the Board to scrutinize the condition of the applicants' tracks, structures, and other physical assets, including locomotives and rolling stock, and to assess their financial means to undertake expenditures needed to maintain safe operations. Depending on what kind of scrutiny is intended, part of this new rule would seem to trench upon the province of FRA, and seems better addressed as part of the STB/FRA rulemaking. However, CN supports the Board's assessment of the financial wherewithal of the combining carriers to undertake all the expenditures that may be required by their application, including the ability to respond to service problems. See CN at 14.

A third RLD proposal is to require disclosure of cross-border work transfer intentions. However, existing rules already require disclosure of labor impacts in the U.S., and there has been no showing of any need for a rule requiring further disclosure. Indeed, the reference to how this issue was handled in CN/IC (RLD at 36 n.8) confirms the lack of any need for a rule.

A fourth RLD proposal, also relating to cross-border transactions, would require the application to address the effects of the transaction on application of U.S. safety laws and regulations to the applicants' operations. No showing has been made for any such new requirement. For years there have been U.S. rail carriers that have operated as part of and under the control of Canadian railways. Yet, no concrete problem has been identified. Moreover, in CN/IC applicants agreed that they would not transfer dispatching of operations on the IC lines to Canada without prior consultation with FRA. CN/IC Decision No. 37 at 45.

The Board's authority contrasts with the apparent situation in the airline and trucking industries cited by RLD, as to which Congress has specifically provided that the Board (as to foreign motor carriers) or other regulatory authority in DOT (as to foreign air carriers) have

regulatory authority. The Board's charter, enacted in 1995 when the role of Canadian railroads concerning U.S. railroads was well known, did not specifically address this issue. In any event, at bottom RLD seems concerned with whether a foreign rail carrier that acquires a U.S. rail carrier "and operate[s] in this country" must do so "on compliance with applicable U.S. regulations . . . ." CN is unaware of any contention to the contrary. The proposed rule, however, is drawn, perhaps inadvertently, to require the applicants to address the application of U.S. laws and regulations to its operations outside the country, an exercise for which no need has been shown.

IV. PROMOTING AND ENHANCING COMPETITION

In its initial comments in this proceeding, CN identified two areas where it noted that the Board could, in the context of approving future mergers, take additional steps to ensure robust competition between railroads. Specifically, CN indicated that it would not oppose a Board policy to apply the bottleneck rate "contract exception" to post-merger situations where the exception would have been applicable prior to the consolidation. CN at 31. In addition, CN recommended that the Board "should be required to propose some form of commitment to the maintenance of open gateways." Id. at 34. Having reviewed the comments of other interested parties, CN is confirmed in its belief that both subjects warrant further Board consideration as it moves forward with its re-examination of its merger policies and regulations. At the same time, however, and as a variety of commenters seem to acknowledge, the Board should not use this proceeding to address mandated "open access," terminal access, "bottleneck" rates, and similar industry-wide issues that ought to be considered, if at all, under a separate, generic proceeding.

A. "Enhancing" Competition

Many commenters have used this proceeding as a platform to discuss whether re-regulation would be appropriate for the railroad industry in general. These comments urge the Board to adopt some or all of the menu of "access" and bottleneck rate-regulation proposals that have been debated before the ICC, the Board, and in Congress for years, and to overturn in whole or in part the Board's Bottleneck and Midtec decisions, and Part 1144 of the Board's rules. CMA, for example, presents testimony that attempts to challenge some of the fundamental economic tenets that have guided the Board in many of these matters, and advocates outcomes generally believed to carry grave risks for the economic well-being of the industry. These risks would not be limited to major railroads. As WCS observes: "the STB appears to be considering a wholesale change in its approach to analyzing rail mergers that will alter the fundamental economics of the industry. Moving from a standard of preserving competition to enhancing competition will have major impact on how the financial markets view investment in the industry . . . [and] could have an inadvertent but devastating effect on regionals and short lines . . ." WCS at 11-12.

In short, these are industry-wide issues; CN is ready to join in the debate, but this proceeding -- designed to consider merger rules -- is not the forum for that debate.[35] Indeed, while a number of commenters urge the Board to condition its approval of future mergers so as to "enhance" competition, several of these same commenters recognize that what they are really

[35]DOT urges the Board to "reject options covering issues that would address wider, non-merger related matters." DOT at 3. For example, DOT states that "[b]ottleneck access is a broad industry issue that ideally should be resolved in a rulemaking or by statute, after full debate about the implications for rail costs, rates and service." Id. at 16.

seeking is Board action on a much broader, industry-wide level, and that these issues transcend the bounds of this proceeding.[36]

Rail shippers also recognize that imposing competition "enhancements" as conditions to future rail mergers would benefit only those who happen to be served by the merging carriers. As NITL notes, "if the Board applies pro-competitive conditions only to merging carriers, then shippers not served by those merging carriers are at a competitive disadvantage." NITL at 12. OG&E notes that any policy objective designed to "enhance" competition "cannot be realized if pro-competitive regulations are adopted for limited application to a merger consolidation. The result would be an unbalanced rail industry." OG&E at 3.[37]

The commenters urging the Board to impose merger conditions that would "enhance" competition fail to deal adequately or at all with the basic legal objection to such conditions. As CN pointed out in its opening comments, the Board must approve a merger that is consistent with the public interest, and a merger that "creates no bottlenecks and that is otherwise consistent with the public interest does not become inconsistent with the public interest in the absence of access." CN at 31-32.

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[36]See, e.g., ARC at 5; CURE at 5 ("The major railroad industry has contracted to the point that a simple change in STB's merger policy that will correct the problem in future mergers is, in itself, inadequate to promote the development of adequate competition in the current national rail system."); DOT at 12; Du Pont at 8; EWLC at 6; NITL at 12 ("It is important for the Board to realize that, if it is going to 'affirmatively enhance,' and just not preserve, competition . . . it should act more broadly than simply in its narrowly-defined 'merger rules'. . . the Board needs to act both within and outside of its 'merger rules' to provide for a truly competitive rail marketplace."); OG&E at 3-4; TFI at 6; TIA at 6.; and WE at 7-10.

[37]OG&E also points out that "competition-enhancing" rules designed to cover only mergers "may provide a disincentive for railroads to merge at all." Id.

While many parties have recognized in their respective comments that the sort of competition "enhancements" they would like to see the Board create are better addressed in a different proceeding, some would like to see the Board use its condition-setting authority to free other railroads from what they regard as disadvantageous contractual or Board-imposed limitations on such carriers' ability to increase market share. Whether such limitations are so-called "paper" or "steel barriers" (which are discussed elsewhere in CN's Reply), or exist as restrictions contained in settlement agreements arrived at as a consequence of prior transactions,[38] each entity seeking relief in subsequent merger proceedings should be required to show that the relief they now seek from such restrictions is directly related to the merger currently before the Board. Otherwise, carriers promoting such a new Board policy will opportunistically see each future merger proceeding as an opportunity to improve their business opportunities on grounds unrelated to any effects of the pending merger.

B. Open Gateways

CN agrees with the many commenters that have asked the Board to revisit the issue of open gateways during the course of any future railroad merger proceedings. As CN stated in its initial comments, the Board should assess a merger's potential impact upon established gateways. Toward this policy objective, CN proposes that merging carriers should submit to the

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[38]KCS in particular proposes a rule whereby all conditions from previous merger proceedings involving either of the current applicants would be subject to reopening if they contain any kind of commodity, operating, or geographic limitation. See KCS at 24-25. Such a rule would, for example, apply to the restrictions contained in the trackage rights granted to Tex-Mex in the UP/SP merger, which trackage rights benefit KCS directly. KCS would have the Board remove all such limitations unless there are "substantial public interest reasons" to continue them. It is unclear what, if anything, such a proposal has to do with the Board's assessment of the competitive impacts, if any, of future railroad mergers.

Board a proposal to protect shipper options through important gateways, and that the Board should evaluate each such proposal in light of the transaction's potential impact upon shipper routes.

As the Board is aware, CN has committed in connection with its BNSF proposal to maintain open gateways. While CN urges the Board to offer shippers added protection with respect to service through important gateways, the Board should avoid resurrecting some variation of the long-discredited and inefficient "DT&I" conditions. See CN at 34. The case-by-case approach CN recommends will give the Board the ability, where necessary, to address service to or from an important interline gateway without unduly obstructing the railroad industry's efforts to develop more efficient service and route options.[39] Further, each merger-related guarantee can be evaluated to see whether or not it provides a suitable mechanism for quickly resolving disputes over post-merger gateway service.[40]

UP proposes a different approach to the maintenance of gateways, under which any exclusively served shipper at an origin or destination facility (other than an automotive, intermodal, or transload facility) could require a merger applicant to establish a rate from the

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[39]A case-by-case analysis of "open gateway" protections not only protects against the inefficient handling of traffic, but also allows for a more careful tailoring of relief that yields balance. As DOT warns: "Conditioning a merger to require open gateways may unduly penalize the merging carriers if other, competing carriers serving the gateway are not required to meet the same standard." DOT at 13.

[40]The Board has recent experience administering similar gateway commitments in connection with the CN/IC merger. In that proceeding, the Board conditioned the merger upon CN/IC's commitment not to foreclose CP-served grain shipper access to the former IC system via the traditional Chicago interchange. The Board elected to review this condition, and CN's commitment not to close the CP/Soo-CN gateway at Chicago, during the course of the Board's oversight of the CN/IC merger. See CN/IC, Decision No. 37 at 37, 56.

facility to the predominant pre-merger gateway if no applicant had a single-line route between the origin and destination. See UP at 12-13. Unlike the change to the Board's "contract exception" discussed by CN in its opening comments (CN at 31), UP's proposed rule would apply even if the merger would not deprive the shipper of any opportunity to secure a separate bottleneck rate.

This is a proposal that should be considered along with other similar proposals in a separate, industry-wide proceeding, and CN does not attempt to evaluate it here. It is evident, however, that there would be no reasonable basis for limiting the application of this rule to future mergers. If the Board were to apply this rule only in the context of mergers, it would need to reopen all prior mergers and apply the rule to them as well. Any other approach would further the protectionist aims of UP, which, having acquired five railroads by merger since the Staggers Act,[41] now urges the Board to apply to future merger applicants the kind of regulation that UP has strenuously resisted in the past.

V. SHORTLINE AND REGIONAL RAILROAD ISSUES

As the Board observed in the ANPR -- and as several of the commenters appear to confirm -- many of the issues relating to short line and regional railroads in actually are, in the context of merger proceedings, offshoots of broader issues relating to service and competition generally.[42] These broader, industry-wide issues are presented comprehensively in the ASLRRA comments, and include "paper barriers," "steel barriers," and alleged discrimination with respect to car supply and rates. Of course, certain provisions in individual line sale and lease agreements

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[41]MP, WP, MKT, CNW, and SP.

[42]The Board essentially so noted in CSX/NS, Decision No. 89 at 57 n.86, and in CN/IC, Decision No. 37 at 38.

between Class I railroads and smaller carriers may, upon proper showing, be revisited where a proposed Class I merger might otherwise result in loss of competition or essential service. As DOT remarks, however, "[T]he Department is concerned about the permanent removal of 'paper barriers' as a condition of a Class I consolidation, unless removal is required to resolve a competitive problem resulting from a merger or as a remedy for service-related issues. DOT at 21.[43]

CN notes that new Board policies with respect to safeguarding rail service and preserving gateways (as discussed in Sections I and IV-B, respectively of CN's Reply) will directly benefit short line and regional carriers, by benefitting the customers that short lines and regionals would serve in partnership with merging Class I railroads. With appropriate measures in place to safeguard post-merger service (both through a service integration plan and potentially also service guarantees to transportation purchasers), there is no need for any further requirement that merging carriers must separately indemnify short line railroads for any possible merger-related service disruptions. Furthermore, should the Board adopt the open gateway policy that CN has generally outlined in Section IV-B, this, too, would be of benefit to any shipper using the merging carriers' routes to or from important gateways, without regard to whether the traffic originated or will terminate on a smaller railroad.

As it mentioned in its initial comments, AAR's and ASLRRA's efforts toward resolving intra-industry issues are still progressing through a private dialogue, and it is possible that future

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[43]DOT also states that short line and regional railroad concerns over such issues as alleged discrimination by Class I railroads with respect to pricing and car supply do not appear to have anything to do with railroad mergers or merger policy (except to the extent that car supply may be an issue in merger implementation generally). Id. at 22.

revision to the Railroad Industry Agreement will result from continued negotiation. See CN at 35. CN urges the Board not to supersede by regulation such private negotiations between the representative associations that may facilitate an understanding of how the railroad industry as a whole can best accommodate the interests of both large and small carriers in the event of future Class I mergers.

VI. EMPLOYEE ISSUES

In its Initial Comments, DOT observed that the "commitment, dedication and ability of [a merged carrier's] workforce (employees and managers) to function together as a team will ultimately determine the quality of service provided to the customer." DOT at 23. CN agrees that the public benefits of rail merger transactions are most readily obtained when *voluntary* agreements, satisfactory to both the carrier and its workers, are reached with the representatives of each of the affected employee groups. Consistent with this principle, the Board should refrain from actions that would limit the flexibility of the parties in reaching mutually agreeable solutions. Specifically, CN urges the Board not to adopt across-the-board proposals either to change the content of existing labor protective conditions or to require that negotiations be completed before consummation of a transaction.[44]

The existing labor protective conditions generally provide an appropriate and generous floor of protection for adversely affected workers. Any proposals to change those protections must be considered in light of the circumstances of a specific transaction and the interests of each affected employee group. Changes that may be acceptable to one employee group (for example,

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[44]This section addresses proposals made by several rail labor organizations (both individually and collectively under the umbrella of the RLD, as well as by the DOT.

the recent agreement between the National Carriers' Conference Committee and the United Transportation Union) may not address the concerns of other crafts. See TCU at 4.

For the Board to mandate different or enhanced levels of labor protection in specific respects would deprive the parties of the flexibility needed to address the impact of a particular transaction on each employee group. Moreover, adopting the various proposals as regulatory requirements would reduce the incentive for parties to reach voluntary agreements through the give-and-take of negotiations. Likewise, by creating an artificial deadline for the completion of negotiations, the Board could precipitate unnecessary disputes or compel parties to reach their "final" positions prematurely. The parties already have every economic incentive to reap the benefits of an implementing agreement, once the parties are ready to come to terms.

CN recognizes that legitimate concerns are raised by the proposals advanced in response to the Board's request for comments on employee issues. CN is committed to addressing those concerns in negotiations. However, CN firmly believes that adoption of the proposals as regulations would be contrary to the public interest favoring the negotiation of voluntary implementing agreements.

VII. "THREE-TO-TWO" ISSUES

In its ANPR,[45] the STB described its method of evaluating potential "'three-to-two' effects" as a "case-by-case examination based on the individual circumstances of each case." ANPR at 9. That approach, as CN described in its opening comments, "looks at both actual experience and reasoned prediction" based upon economic logic (CN at 37), and has been

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[45] Major Rail Consolidation Procedures, Ex Parte No. 582 (Sub-No.1), Slip op. (STB served March 31, 2000).

confirmed in the courts. See Union Pac. Corp. – Control – Southern Pac. Rail Corp., Finance Docket No. 32760, Decision No. 44, 1996 WL 467636, slip. op. at 116-21, 267-73 (STB Aug. 12, 1996) ("UP/SP") (examining empirical and economic evidence and finding that, in fact and in theory, railroads have incentives to compete with one another in two-railroad markets, and do compete effectively), petition for review denied sub nom. Western Coal Traffic League v. STB, 169 F.3d 775 (D.C. Cir. 1999); Burlington N., Inc. – Control – Santa Fe Pac. Corp., Finance Docket No. 32549, Decision No. 38, 1995 WL 528184 (ICC Aug. 16, 1995) (same), petition for review denied sub nom. Western Resources, Inc. v. STB, 109 F.3d 782 (D.C. Cir. 1997); CN at 37-40. Many comments filed in this ANPR, including CN's and those of the other major Class I railroads, affirmatively support the Board's existing approach to three-to-two issues or, at a minimum, see no reason for changing it.[46]

A number of commenters, however, assert that the Board has adopted a "presumption" that reductions from three-to-two railroads do not diminish competition; these and other commenters urge the Board to make no presumption, or to adopt a reverse presumption or a rule that three-to-two situations will generally be treated in the same way that the Board treats two-to-one situations.[47] Some urge the Board to apply the FTC/DOJ Merger Guidelines,[48] apparently

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[46]See, e.g., Comments of BNSF (no change); CP (no change); NS (no change); CSX (no change); WCS (no change); DOT (no change); WCTL et al. (no change).

[47]See, e.g., AAM (eliminate case-by-case approach and establish no presumption in favor of mergers reducing carriers from three-to-two); EEI at 3-4 ("it cannot be presumed that" a reduction from three to two carriers "would not cause a reduction in competition" so STB should "consider the loss of competition from three carriers to two to justify a remedy for the shipper"); CMA & APC at 22 (Board should treat situations where there are three or more carriers serving a point but only two effectively serving a particular route as two-to-one situations); NGFA at 13-14 (three-to-two situations should be recognized in merger rules as "potentially harmful reductions in competition"). Indeed, KCS's proposed rule (KCS at 12) would have the Board preserve the

unaware that the factors that the Board has identified that militate against the likelihood of tacit collusion in two-railroad markets are the factors identified in the Merger Guidelines. See CN at 39 & n.20.

Contrary to the views of some of the commenters, the Board's approach to three-to-two issues examines all relevant factors raised by a party, on a case-by-case basis. As CN stated, this approach "has proven accurate, and it is flexible enough to take account of any factors that bear on the likelihood of a reduction in competition from a three-to-two change. There simply is no reason to change it." Id. at 39-40.

The commenters have not given the Board any reason to change its case-by-case approach, and the Board does not need a rule to continue that approach. The parties urging different approaches do not offer a single item of new evidence to support their assertions that the Board somehow has gotten it wrong. Instead, to the extent commenters offer any evidence at all, it is evidence that the Board has previously considered and found insufficient in past merger

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number of carriers, whatever the number, e.g., four or five. The burden would be on applicants to demonstrate a "substantial public interest justification" for any reduction in the number of carriers; apparently, it would not be sufficient to demonstrate that there would be no reduction in competition. KCS's "justification" for this rule is that, without it, "the rail industry will inevitably merge itself down to two railroads"; that structure would not be in the public interest; and efficiencies can be achieved without mergers. KCS at 13-14. KCS's "justification" is obviously misconceived. The Board's approach to three-to-two situations is not going to determine the final outcome of the U.S. rail industry, nor could the Board defensibly adopt a new approach to such situations on the assumption that deterrence of further mergers would not harm the public interest because all efficiencies can be gained without mergers.

[48] See, e.g., IMPACT at 5 (advocates assessment of proposed mergers in light of DOJ/FTC merger guidelines); WCTA at 7 (STB should apply DOJ/FTC merger guidelines).

proceedings.[49] The Board should reject attempts by parties to gain through rulemaking what they were unable to persuade the Board to do on a fully developed litigation record.

VIII. MERGER-RELATED PUBLIC INTEREST BENEFITS

The comments on this topic involve distinct issues: first, whether merger benefits and efficiencies can be achieved by some other means, and whether those other means would entail fewer risks of public costs (CN will refer to this issue as "transaction-relatedness"), and, second, whether projections of merger benefits are reliable, apart from whether they are achievable by some other means. The first of these involves comparisons between merger and contract as means of achieving benefits and efficiencies; the second involves the nature of projections in merger applications.

A. Merger vs. Contract

In initiating this rulemaking proceeding, the Board asked whether "merger applicants [should] be required to show that any claimed synergies or other public interest benefits could not be achieved short of merger, through marketing alliances or cooperative operating practices." ANPR at 9. Voluntary coordinations and alliances are hardly a new development in the rail industry, and they are widespread today. In the right circumstances, these arrangements can be valuable in achieving relatively limited and specific goals, for at least so long as the participating railroads continue to consider them to be in their economic self-interest in light of their own

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[49]For example, KCS tells the Board that it was wrong on an asserted three-to-two issue in UP/SP, which KCS litigated and lost in that proceeding. See KCS at 8-11. KCS now includes with its comments a verified statement by Dr. Curtis Grimm, who had testified unsuccessfully on behalf of KCS on the same issue in UP/SP. Dr. Grimm, in his latest statement, cites the same articles that the Board reviewed in UP/SP and found insufficient as a basis for imposing three-to-two conditions, an assessment with which DOT agreed. Compare KCS, Verified Statement of Curtis Grimm at 10-13 with UP/SP, Decision No. 44, slip op. at 119-20, 267-71.

evolving opportunities and priorities. However, if voluntary coordinations could be used to realize the level and scope of efficiencies realized for mergers, and on a sustained basis, such arrangements would long ago have eliminated the motivation for rail mergers.

In its initial comments, CN explained some of the many reasons why alliances or other contractual relationships between independently managed railroads, while effective to a point, cannot bring about the efficiencies and service benefits that mergers can bring, and why these fundamentals are not changed by the supposed new developments cited by sudden railroad converts to the view that mergers are unnecessary. See CN at 41-45. CN noted that, under the Board's longstanding approach, "parties opposing a merger are free to offer evidence to draw into question the transaction-relatedness of various public benefits. The Board evaluates such evidence while avoiding close second-guessing of business judgments, management initiatives, and shareholder votes." CN at 40.

The comments reveal that virtually no shippers are urging the Board to change its approach to determining the transaction-relatedness of anticipated public benefits.[50] It is the competitors of CN and BNSF that urge a change. Thus, UP would have the Board treat as public benefits only those that are "incremental" to those that could be "practicably achieved" by other means. UP at 18. NS suggests a "sort of 'least restrictive alternatives' standard providing that a claimed benefit will justify approval of a major rail combination only if the benefit cannot be

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[50]By CN's review, only GPTC asserts on behalf of shippers that applicants should be required to prove that "less competitively restrictive alternatives to merger that would achieve the same efficiencies and benefits are not available except by merger." GPTC at 5. Whether or not this proposal would represent a change in current practice, GPTC's real position is that "the Board should not even consider efficiency in rail merger analysis." Id. The only other commenters other than the Class I competitors of CN and BNSF supporting some form of a "merger-relatedness" requirement for future applications are ASLRRA and the PANY/NJ.

achieved by other means posing less risk to the public interest." NS at 16. CP "generally endorses an approach under which the STB would 'raise the evidentiary bar' relating to the evaluation of public benefits." CP at 18. KCS asserts, relying in part on testimony that the Board explicitly found to "lack credibility" and rejected in UP/SP (Decision No. 44, slip op. at 110-12), that if its various proposals chill further mergers, that result would be no great loss because "alternative means exist for obtaining these efficiencies." KCS at 18; see also id. at 19-20.

At the same time, the railroad comments do not present a uniform picture. NS, for example, "does not agree with those who have suggested that there are no significant operating efficiencies, service improvements or other public benefits to be gained from further major rail consolidations." NS at 11. NS's own supporting witness offers a succinct assessment of alliances: "Alliances are hard to create and manage and easily come undone." NS Comments, McClellan V.S. at 4. Mr. McClellan's observations have particular pertinence to the Board's view of the "key problem" faced by railroads – how to improve profitability through enhancing service – the solution to which is "linked to adding to insufficient infrastructure." ANPR at 3. Mr. McClellan states that if "large investments are required, alliances are unlikely to provide the security needed to justify such investments." McClellan V.S. at 8. CN outlined in its opening comments why that is so.

Similarly, CP, despite asking the Board to "raise the bar," is careful to state that the Board "should not adopt a rule under which such benefits would be disregarded . . . unless the applicants prove that those benefits could not be achieved by any means short of merger." CP at 19. To the contrary, CP agrees that railroads "(like other businesses) should have the freedom to

make the strategic determination whether to pursue such benefits i.e., new efficiencies and improved service offerings via formal merger or by partnering with unaffiliated carriers." Id.

Indeed, no party in this proceeding (except perhaps KCS) has asserted that further railroad mergers would yield no benefits beyond those that can be obtained from alliances. If the Board applies its rules in such a way that, as a practical matter, railroads are left to try to achieve service and efficiency benefits only through alliances, it is clear that railroads will consistently fall short of the full range and extent of benefits that might otherwise be extended to the public.

What all of this adds up to is anything but a clear formula for testing merger-relatedness. And for good reason; there is no such formula. The Board's rules already provide that the Board "will consider whether the benefits claimed by the applicants could be realized by means other than the proposed consolidation that would result in less potential harm to the public." 49 C.F.R. § 1180.1(c).[51] The Board should continue to examine evidence that challenges the merger-relatedness of benefits, while avoiding the potential inherent in this type of inquiry for imposing fruitless evidentiary burdens in which opponents conjure and applicants are expected to rebut every imaginable alternative, inviting "opportunism by competitors and other third parties

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[51]The Board's rule properly recognizes (as UP's proposal does not) that the proper test is not simply whether the benefits could be realized by any means other than a merger, but whether they could be realized by means that "would result in less potential harm to the public." Thus, under its present rule, the Board can take into account the absence of likely reductions in competition or service disruptions from a proposed merger in evaluating merger-relatedness, as well as the potential anticompetitive effects or other public costs of alliances or other supposedly less restrictive alternatives. The anticompetitive potential of alliances and joint ventures between competitors forms the basis for the recently issued FTC/DOJ Antitrust Guidelines for Collaborations Among Competitors (April 7, 2000) <http://www.ftc.gov/os/2000/ ftcdojguidelines.pdf>.

seeking to delay or dampen the procompetitive impacts of a business combination." CN at 45 (quoting Vellturo Statement at 21).

These matters do not require a new rule; they are matters of sound application of the Board's present rule, in the context of particular proceedings, to undertake reasonable examination of the merger-relatedness of public benefits while avoiding second-guessing of reasonable business judgments. In examining these issues, the Board should remain mindful of the fact, as Dr. Vellturo pointed out in his statement accompanying CN's opening comments, that if some means other than merger "were a more efficient mechanism by which the parties could achieve additional cost savings or service/output enhancements than the proposed merger, then those alternatives would have been chosen by the parties as the more financially responsible use of their firms' scarce resources." CN at 41 (quoting Vellturo Statement at 22).

Although the railroads that would have the Board institute a new "merger-relatedness" standard generally point to certain new business and technological advances that they believe may bring about "virtual" railroads without merger,[52] the Board should be wary of such claims. There is a large difference between announcing an alliance or other cooperative agreement and actually implementing and sustaining the arrangement to the mutual and continuing satisfaction of both parties. As CN described in its opening comments, many of the factors that limit alliances are specific to railroads. It may be useful, however, to consider briefly the fact that alliances have been utilized in another sector of the transportation industry -- airlines. The experience in that industry has been that such alliances have proven to hold much promise in the

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[52]See Grace Shim, U.P. Sidetracks Hassles with Canadian Linkup, Omaha World-Herald, May 14, 2000 (quoting Dick Davidson, C.E.O. of UP), available in WESTLAW, Search ALLNEWS/INDIVIDUAL PUBLICATIONS.

beginning, less substance in the carry-through, and appear as often as not to end without the hoped-for public benefits ever being achieved, or, benefits are achieved but not sustained as new opportunities present themselves to the alliance partners and their perceptions of economic self-interest change. As recently as last month, in an insert entitled "Special Report: Air Cargo Update," the Journal of Commerce reported:

> The abrupt end to the much-ballyhooed Northwest-KLM-Alitalia alliance begs the perennial question of whether airline alliances work and at what cost. While Northwest Airlines and KLM, the longest-standing airline alliance, continue to work together and after nearly 10 years are coordinating cargo activities, *the reality is that far more alliances fail than survive.*

Kristin S. Krause, Keeping Tabs on Alliances, in Special Report: AIR CARGO UPDATE, Journal of Commerce, May 8, 2000, available in 2000 WL 4188213 (emphasis added).

Like the railroads, airlines, too, can and do make significant use of new business and technological advances. Such new information-era advances, however, have not heralded a new era in the airline industry. As one airline executive is reported to have reflected, airline "alliances are more of a quick fix . . . mergers and acquisitions are more beneficial in the long term." Industry Split on Viability of Alliances, World Airline News, Mar. 24, 2000, available in 2000 WL 8230017. In language that echoes NS's James W. McClellan's words in this proceeding, a recent account of the demise of the Delta Air Lines - Singapore Airlines -Sair Group alliance stated:

> Each [member of the alliance] held modest stakes in each other to cement their alliance in the 1990s. . .
>
> It fell apart anyway. . .
>
> "It has to be a majority stake or a stake where you can have significant influence," [Commerzbank airline analyst, Chris Tarry] said.

> So most airlines stick to their alliance only because of the continuing business case for being in it. If that business case deteriorates, they leave.

Bradley Perrett, Airline Alliance Collapse Proves That Nothing Lasts Forever, Birmingham Post, May 6, 2000, available in 2000 WL 20181236.

In many cases in both industries, alliances can and do achieve many of their objectives, and for a sustained period. But, as with airlines, alliances in the railroad industry will always have inherent limitations and instabilities. The notion that they have somehow become a complete substitute for mergers cannot reasonably shape the Board's examination of transaction-relatedness.

B. Second-Guessing Applicants' Projected Public Benefits

Various commenters claim that, in past mergers, the Board's findings reflected unrealistically high estimates of projected public benefits. These commenters urge the Board to be more "skeptical" about such projections,[53] or to treat them as promises or guarantees.[54]

CN believes that the Board should and does take a rigorous approach to the evaluation of public benefits, as with any other item of evidence offered by applicants or opponents of a merger. CN's experience with past merger proceedings is that the Board already engages in a thorough examination of the public benefits that may result from each particular consolidation,

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[53] See, e.g., AFBF at [unnumbered] 3; NGFA at 15; NITL at 9; OG&E at 5.

[54] See, e.g., IMC at 7 ("IMC is strongly of the view that merger applicants should be held to their promise of improved rail service. Post-merger monitoring of rail service should be conducted."); ORDC at 3; PP&L at 14-15 ("The Board also should position itself to order remedial action by the merged railroad to enhance benefits or mitigate harm to competition whenever actual benefits, or measures to mitigate harms, fall short of meeting their goals."); and SPI at 12 ("carriers which have been granted merger approval publicly account for their progress in achieving the benefits projected").

and it is not accurate to suggest that the Board merely embraces whatever public benefits have been set forth in past merger applications. The Board's processes, which include sworn testimony and the opportunity for discovery, including depositions, are designed to facilitate such an approach and allow parties to become fully informed about the basis for opposing positions, and to test them. In future proceedings, participating parties will have the benefit of the evidence and insights that have been developed during the course of the post-merger oversight proceedings, many of which are still ongoing, that the Board has required for recent mergers, and which generate substantial information covering the performance of the merged railroad.

It would be unrealistic, however, to expect the Board's merger review processes to turn projections of public benefits into something they are not: precise predictions. Merger applicants' evidence of public benefits, as with evidence relating to market impacts, are good-faith, forward-looking estimates of efficiencies and shipper benefits that ultimately will reflect numerous factors not within the control of any merging railroad, including trade patterns, competition from many quarters, and changing technologies.[55] See 49 C.F.R. §§ 1180.6(a)(2), 1180.7.

Moreover, the comments that urge greater "skepticism" make general assertions that past merger projections were overstated, but do not assert, or offer evidence, that past mergers have failed to realized any benefits, or realized only trivial benefits, or that, if there were perfect knowledge at the time of the merger, the merger would have not been found consistent with the

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[55]As NS points out: "Estimates of merger-related benefits necessarily involve predictions about the future effects of an often complex transaction that, by definition, has yet to be implemented." NS at 13.

public interest.[56] Projected public benefits are typically in the range of hundreds of millions of dollars, and any such claim would itself warrant the utmost skepticism. Certainly in the aggregate, rail industry performance during the period of consolidation has been strongly pro-competitive, as indicated by increasing output and declining prices. See Vellturo Statement, CN at 71-74. Of course, that industry performance does not mean that each shipper benefitted as it expected to from each merger, or that merger benefits were exactly as predicted, or benefitted all shippers, or benefitted shippers on the timetable that they expected. It is inevitable that some particular projected benefits may not be realized, or may be realized more slowly than projected; it is also true that other unanticipated benefits may arise. See CN at 45-46. These considerations do not point to any fundamental change in the Board's already-rigorous approach to its evaluation of merger benefits.

Finally, the Board should not let a healthy "skepticism" about projected merger benefits induce a conservatism which limits the Board to recognizing only the standard elements of "traditional" benefits (such as expanded single-line service, more efficient train service and scheduling, and new market access to rail-transported commodities). Rather, the Board must be

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[56]Many of the commenters asserting that past mergers have failed to realize benefits are in fact reflecting the service disruptions that attended the UP/SP and CSX/NS transactions. These service disruptions do not support the conclusion that the benefits projected for those mergers will not be realized as those railroads move past their transitional disruptions. To the contrary, the Board has found that the benefits projected for the UP/Southern Pacific merger are being realized. UP/SP STB Finance Docket No 32760 (Sub-No. 21), Decision No. 15 (STB served Nov. 30, 1999). More recently Traffic World reported as follows: "[UP C.E.O. Dick] Davidson said UP now is delivering on each of its premerger promises. . . ." Frank N. Wilner, Fragile Railroads Traffic World, May 22, 2000 at 31. The CSX/NS transaction is only one year into the three-year implementation period. However, the Progress Reports just filed in the Conrail Oversight proceeding state that, despite service problems, projected benefits are beginning to be realized. CSX/NS (General Oversight), Finance Docket No. 33388 (Sub-No. 91) (CSX-1, NS-1)

both skeptical and forward-looking. As CP has noted in its comments, for example, the Board should take into account how recent technological innovations, e-commerce, and supply chain logistics services may produce new categories of merger benefits. See CP at 18. In fact, applicants may be able to demonstrate in particular mergers how such innovations may make it possible for merging carriers to achieve projected "traditional" public benefits more expeditiously and effectively.

IX. CROSS-BORDER ISSUES

The comments that addressed so-called "cross-border issues" confirm that, as CN stated in its opening comments, no new merger policies or rules are required to address "cross-border issues [that] can be dealt with as they arise, just as they have been in the past."[57] Many commenters seek inappropriately to interject the STB into matters that are already being addressed in non-STB processes – such as international trade and foreign policy – which are not proper subjects for new merger guidelines or rules. Other concerns are appropriately addressed by the case-by-case approach of the current merger policy guidelines and rules.

1. All of the comments addressing the ramifications of the North American Free Trade Agreement ("NAFTA") were unanimous that, as WCS stressed, "[t]he Board should be wary of invitations to a more protective or parochial approach." WCS at 14. See also CN at 49-50; BNSF at 33; CP at 20; Tex-Mex at 5. Certainly objectionable under NAFTA are comments that

[57]WCS at 13-14. See also NS at 62 ("all of these issues can be dealt with adequately on a case-by-case basis in the context of particular major rail consolidation proposals").

explicitly ask the Board to take a "parochial and protectionist" approach.[58] Also objectionable are those that do so implicitly.

For example, contrary to NAFTA, CSX suggests that the Board formally adopt a new regulation declaring that Canada's (and any other country's) "[legal] requirement. . . "concerning the nationality or residence of the persons who may be directors of the applicants, entities resulting from the combination, or any entity controlling any of them, or who may be officers or employees of any such company or other entity" will be "disfavor[ed]" and "may be a basis for finding that a transaction is not consistent with the public interest." CSX at 25, D-3. In NAFTA, however, the U.S. agreed to allow Canada to continue to apply such legal requirements, embodied in both the Canada Business Corporations Act, R.S.C. 1985, and the Canada Business Corporations Act Regulations. See NAFTA Annex I (Canadian reservation regarding "Senior Management and Boards of Directors"). Notably, the U.S. made no such reservation applicable to rail.[59] That fact is ignored by Empire Wholesale when it suggests that the Board adopt restrictions similar to Canada's so that "no Canadian railroad could own a U.S. railroad without having to choose which country's law to violate." Empire at 7. Empire's suggestion cannot withstand NAFTA, in which the U.S. agreed (in the absence of a reservation) to "*not* materially

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[58]EWLC at 7.

[59]The intention of the U.S. not to apply such requirement to rail carriers is underscored by the fact that the U.S. did make certain NAFTA reservations regarding air carriers – which must be "citizens of the U.S.'" under the Federal Aviation Act of 1958, 49 U.S.C. App. Ch. 20, and "in fact be under the actual control of U.S. citizens" as interpreted by the DOT – and cross-border bus and truck services. NAFTA Annex I. The U.S. made no such reservations for rail carriers, however. See n. 67, infra. In any event, any legitimate foreign control issues should determine whether a simple majority of shareholders are U.S. citizens. In the case of CN, for example, 85% of its shareholders are U.S. citizens.

impair the ability of the investor to exercise control over its investment" by "requir[ing] that a majority of the board of directors . . . be of a particular nationality, or resident in the territory." NAFTA Art. 1107(2) (emphasis added).

CSX trenches on similar foreign policy concerns when it suggests that the Board assess "significant environmental impacts outside the U.S. as a result of Board action," taking "the [foreign] country's regulations applicable to potential environmental impacts." CSX at 26. CSX is of course wrong to claim that "[f]uture mergers involving non-U.S. based carriers *raise for the first time*" environmental impacts in foreign countries, because, as CSX well knows, the ICC and the Board have dealt with a number of control and other proceedings over the past 20 years involving rail carriers with operations outside the U.S., and hence potential effects outside the U.S., without subjecting such effects to scrutiny under NEPA or Executive Order No. 12114 (1979).[60] In any event, application of NEPA to effects in another country would be at odds with the strong presumption against extraterritorial application of statutes, the primary purpose of which is "to protect against the unintended clashes between our laws and those of other nations which could result in international discord." EEOC v. Arabian Am. Oil Co., 499 U.S. 244, (1991).

The Board, as an independent agency, is not bound by executive orders (Humphrey's Executor v. U.S., 295 U.S. 602, 625-26 (1935)), but even if it were, Executive Order No. 12114 only requires agencies to develop procedures that take account of the extraterritorial impacts to

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[60]See, e.g., Canadian Pac. Ltd. – Purchase & Trackage Rights – D&H Ry., 7 I.C.C.2d 95 (1990); CSX Corp. – Control – Conrail Inc., STB Finance Docket No. 33388, Decision No. 89 (STB served July 23, 1998); Canadian Nat'l Ry. – Control – Illinois Cent. Corp., STB Finance Docket No. 33556, Decision No. 37 (STB served May 25, 1999).

the "environment of the global commons outside the jurisdiction of any nation (e.g., the oceans or Antarctica)" (E.O. 12114, § 2-3(a)),[61] "the environment of a foreign nation . . . not otherwise involved in the action" (as Canada would be in the case of a Canadian-U.S. merger) (id. § 2-3(b)),[62] and "the environment of a foreign nation [when] provid[ing] that nation . . . radioactive substances" or toxic substances. Id. § 2-3(c). The Order does not require federal agencies to disregard the separate sovereignty of nations such as Canada and Mexico, and to do so unilaterally would be contrary to NAFTA's companion agreement, the North American Agreement on Environmental Cooperation, which reaffirms "the sovereign right of [signatory countries] to exploit their own resources pursuant to their own environmental and development policies."

In the same vein, UP disregards principles of international comity when it asks both that applications be required to identify "competitive impacts . . . outside of the U.S." and that the Board "impose conditions to ameliorate potential adverse effects arising outside the U.S." UP at 21.[63] The Supreme Court has long recognized that U.S. law cannot generally be extended

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[61]See, e.g., Association of Public Agency Customers, Inc. v. Bonneville Power Admin., 126 F.3d 1158, 1187 (9th Cir. 1997); Environmental Defense Fund, Inc. v. Massey, 986 F.2d 528, 530 (D.C. Cir. 1993).

[62]See, e.g., Daniel R. Mandelker, NEPA Law and Litigation § 5.04[3], at 5-41 (1999) (application limited to "third-party nations. In this situation, an action by the U.S. assisting one nation has transboundary environmental effects on another nation.").

[63]The Ports of Seattle, Tacoma and Everett similarly disregard international comity when they propose a system of "supplementary guidelines" that, when applicable, would "apply to the operation of [a] company . . . in the foreign country ir the same manner as if those operations took place in the U.S.." POSTE at 16.

extraterritorially to police competitive impacts in other countries.[64] For the Board to unilaterally apply its governing statute to do so would also be contrary to NAFTA, which both requires each signatory country to adopt or maintain their own "measures to proscribe anticompetitive business conduct and take appropriate action with respect thereto" (NAFTA Art. 1501(1)), and establishes a Working Group on Trade and Competition to make recommendations "on relevant issues concerning the relationship between competition laws and policies and trade in the free trade area." NAFTA Art. 1504.

The comments addressing NAFTA and other international trade agreements also demonstrated that there are already processes in place to directly address both USDA's concern about "Canadian grain merchandising and transportation environments," which may confer "national advantages" (USDA at 19-20), and Seneca Sawmill's concern that a "process mechanism needs to be in place . . . prior to any such merger being considered," to consider its claim that "it is the history of the Canadian Government to subsidize their wood products manufacturing facilities, one of the most significant ways having been that of reducing rail rates." Seneca Sawmill at 2.[65] As BNSF describes, "NAFTA and WTO have provided new mechanisms

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[64]See, e.g., American Banana Co. v. U.S. Fruit Co., 213 U.S. 347 (1909). In American Banana, the plaintiff alleged that the defendant, a U.S. corporation, had violated U.S. antitrust laws by inducing a foreign government to take actions within its own territory which were adverse to the plaintiff's business. The Supreme Court refused to apply the federal statute to the conduct of a foreign government, because enforcement would have interfered with the exercise of foreign sovereignty.

[65]USDA's demonstration that certain "Canadian rail rates are capped" (USDA at 20), answers its concern that "the profits earned on U.S. rail lines could be invested to improve Canadian rail lines rather than improving U.S. lines." Id. at 21; see also UTU at 3 ("Canadian railroads may not have sufficient interest in maintenance of the U.S. rail system"). Rational economic choice will channel greater investment towards the resources providing the greater return. If managers of cross-border railroads were to deviate from rational economic choices,

for resolving" matters such as the "long history of disputes between U.S. and Canadian grain and lumber interests." BNSF at 33. Thus, to take the lumber example, the U.S. Government has already utilized international trade processes to rectify alleged Canadian subsidies (among other things), by joining with Canada in the Softwood Lumber Agreement to level the playing field by imposing negotiated export fees on Canadian lumber. Any remaining concerns over perceived unfair Canadian subsidies in any industry should be dealt with directly through such international agreements, and not indirectly and unilaterally by the Board in its merger policies and rules.[66]

2. The concerns expressed by certain unions regarding "effect of the proposed transaction upon the application of U.S. safety laws and regulations"[67] merit no new merger guidelines or rules. Notably, the unions were unable to indicate any actual safety problem attributable to cross-border operation, despite more than 100 years of foreign ownership history.[68] The reason they were unable to do so was confirmed by other comments: railroads with cross-border operations observe all applicable laws on both sides of the border,[69] and even with

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they would risk violating the fiduciary duties owed to their shareholders. See, e.g., BNSF at 32.

[66]As CN explained in its opening comments, the Board should likewise leave to these international trade processes concerns over traffic diversions from U.S. ports. No commenters contended that these international processes would be insufficient. On the other hand, WCS was correct to point out that, in addition, "[t]he Board's normal consideration of diversion impacts and preservation of essential services in a consolidation proceeding can occur just as effectively whether traffic is potentially drawn to a port in Canada or another port in the U.S." (WCS at 14-15), which further meets MTMC's re-framed concern that continued significant diversions from U.S. ports could one day "eventually impact[] the ability of those ports to meet National Defense needs." MTMC at 7.

[67]AFL-CIO at 38-39. See also UTU at 3.

[68]See Tex-Mex at 20.

[69]CP at 20.

"predominant foreign control" (ANPR at 9)[70] a U.S. railroad's operations would still be subject to the jurisdiction of the FRA.[71] Moreover, if there was any doubt as to FRA's jurisdiction, DOT's comments disclose that "FRA is now working on a rulemaking to address . . . definitively" the extent of compliance with U.S. safety rules and FRA's enforcement ability for railroads with cross-border operations (DOT at 33), confirming that further regulatory action with regard to cross-border safety regulations (should there be any need for it) is best undertaken directly and not secondhand through the STB's merger procedures.[72] That is true even if the perceived problem were to concern the need for uniform standards across national boundaries, because the NAFTA countries have established a Land Transportation Standard Committee with a "Rail Operations" working group to see through the countries' commitments on safety standardization. See NAFTA Art. 913. That trilateral process should not supplanted by unilateral Board action.

The long history of foreign ownership of U.S. railroads (which has included several periods of war) also demonstrates no need for the Board to amend its merger policies or rules out

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[70]Although the Board did not specify the meaning of "predominant foreign control" in the ANPR, it should be defined as ownership by a majority of foreign shareholders. Thus, a residency requirement for a majority of directors would not constitute predominant foreign control, if they are elected by predominantly U.S. shareholders. Thus, for example, North American Railways, Inc. (a holding company formed to implement the proposed BNSF/CN combination) is a Delaware corporation whose directors are subject to Delaware corporate law (and federal U.S. laws) in the performance of their duties; the residency rules of the Canada Business Corporations Act are thus not applicable *per se*. Rather, the residency requirement will be imposed as a result of approval of the transaction by the shareholders of both railroads, approximately 85% of whom are U.S. citizens.

[71]WCS at 15. See also BNSF at 31 (noting that "FRA would retain its full authority").

[72]WCS at 15 n.7 (citing CP v. STB, 197 F.3d 1165 (D.C. Cir. 1999)).

of concern for the national defense.[73] Moreover, in time of war, domestic rail assets remain subject to statutory national emergency powers, which grant the U.S. government the ability to use such domestic assets without regard to predominant foreign control.[74] Those facts should allay MTMC's concern that "the merger would not degrade the carriers' ability and willingness to contribute to defense objectives and readiness," and that "the carriers' rail service and equipment are available for the movement of DOD equipment and materiel in time of war or other contingency." MTMC at 8-9.

MTMC addresses neither this history nor the statutory emergency powers that Congress has found sufficient.[75] If more were nonetheless needed, the approach should be the same as recommended in the Rail Services Planning Office ("RSPO") rail merger study on which the ICC predicated its original merger policy guidelines. Rather than make national defense a permanent criteria in all mergers, even when it is not legitimately at issue, RSPO "recommend[ed] that national defense should be a merger criterion, only if the DOD asserts as an intervenor that serious defense issues are at stake." Rail Services Planning Office, Rail Merger Study: Final Report 41 (Feb. 1, 1978).[76] The intervening years have only lessened the need for even that mild

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[73]See, e.g., CP at 20.

[74]WCS at 14-15; BNSF at 31.

[75]MTMC also raises other concerns that are already addressed fully in current law. For example, 49 U.S.C. § 11323 addresses MTMC's concern that, if "a merged carrier is owned or controlled by a foreign entity, the ability of that entity to sell its ownership or controlling interest to a third party without regulatory approval." MTMC at 9. The foreign owner is subject to § 11323 to the same extent as any domestic owner.

[76]See also DOT at 35 ("we strongly urge the Board to be attentive to issues raised by DoD" in cross-border control proceedings, because of "the potential for defense concerns").

recommendation, however. Since 1988, the so-called Exon-Florio Amendment has given the Commander in Chief the power to suspend or prohibit any foreign acquisition of a U.S. railroad when national security could be threatened or impaired. See Pub.L. 100-418, Title V, § 5021, 102 Stat. 1425 (Aug. 23, 1988).[77]

3. Operating from a mistaken premise, several commenters have suggested that the Board's merger policies and rules need to be modified so that cross-border merger applicants will not unilaterally exclude non-U.S. operations from description in their applications and operating plans.[78] The premise for these comments are mistaken because the Board's current rules generally require that applications include *all* information necessary to evaluate the proposed operations of the combined carrier. See, e.g., 49 C.F.R. §§ 1180.4(c)(2)(v), 1180.8. See also Canadian Nat'l Ry. – Control – Illinois Cent. Corp., STB Finance Docket No. 33556, Decision No. 4, slip op. at 2-3 (STB served June 23, 1998).

Relatedly, NITL asks the Board to require applicants "to separate the benefits and harms of a transaction that will accrue in the U.S. and Canada." NITL at 22. Railroads, however, are networks that are operated in a common economic interest. Network-wide savings enabled by the transaction, such as reduced equipment costs through greater utilization or greater purchasing power, cannot meaningfully be attributed to a single geographic location. Notably, NITL does not suggest any way to make its suggested geographic separation.

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[77]See generally BNSF at 31. In particular, this statutory procedure fully addresses MTMC's "specific concern" that "a foreign owner acceptable to the STB and DOD may sell its interest to a foreign owner that is unacceptable, for financial, National Defense, or other reasons." MTMC at 9.

[78]See, e.g., DOT at 32; NS at 62-63; NITL at 22; CMA & APL at 23; CPPA at 5.

CONCLUSION

The record now before the Board demonstrates that only a few matters might reasonably proceed to the stage of a proposed rule. These might include certain matters relating to safeguarding rail service; a simple procedural change relating to petitions for waiver of the one-case-at-a time rule; and a rule to preserve for shippers the contract exception provided by the Board's Bottleneck decision. The record also shows that there are few, if any new issues now before the Board. Expedition is therefore warranted. As CN requested in its opening comments, the Board should conclude this merger rulemaking within six months of May 16, the date on which opening comments were filed.[79] At the same time, the Board may wish in separate proceedings to conduct the informational hearing that CN has described with respect to transcontinental "duopoly," as well as a separate inquiry into issues that are of concern to many but are not merger-related, including the various proposals relating to "access" and bottleneck rate regulation, and shortline issues.

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[79]Rulemaking is a flexible process. An advance notice of proposed rulemaking is entirely optional and discretionary. The Board is not be bound to propose rules on all subjects, or on the final timetable outlined before it has received any comments.

Respectfully submitted,

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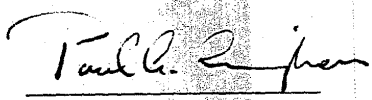
June 5, 2000

CERTIFICATE OF SERVICE

I certify that I have this 5th day of June, 2000, served copies of the foregoing Reply Comments of Canadian National Railway Company upon all known parties of record in this proceeding by first-class mail or a more expeditious method of delivery.



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